No. 89-333

Supreme Court, U.S.
FILED
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CLERK

In The

Supreme Court of the United States

October Term, 1989

STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL ENERGY REGULATORY COMMISSION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 26, 1989
CERTIORARI GRANTED DECEMBER 4, 1989

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1. DOCKET ENTRIES (NINTH CIRCUIT)

California v. Federal Energy Regulatory Commission, No. 87-7538

* * *

12/21/87 FILED PETITION FOR REVIEW; DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL; NOTIFIED RESPONDENTS OF FILING; SENT PETITIONER CIVIL APPEALS DOCKETING STATEMENT. (ogm) [Entry date 12/22/87]

1/5/88 Filed as of 1/4/88 petitioner's Civil Appeals Docketing Statement served on 12/30/87 (to CONFATT) [87-7538] (ch)

1/11/88 Filed as of 1/8/88, Rock Creek Limited's motion to intervene on behalf of the respondent [87-7538] served on 1/7/88. [411586] (CIVATT) (ogm) [Entry date 1/15/88]

1/15/88 Filed as of 1/13/88, petitioner's (State of California) non-opposition to Rock Creek Ltd's motion to intervene, served on 1/12/88. (CIVATT) [87-7538] (ogm)

* * *

1/27/88 Filed order CIVATT (SMJ) granting motion of Rock Creek Lmtd. to intervene. [411586-1] [87-7538] (dl)

2/3/88 FILED AS OF 2/1/88, CERTIFIED LIST IN LIEU OF ADMINISTRATIVE RECORD ON APPEAL ORIGINAL ONLY. [87-7538] [87-7538] (ch)

2/22/88 Sent letter notifying counsel of exclusion from Pre-Briefing Conference program. setting schedule as follows: appellant's brief, excerpt due on 4/4/88 for State of California. [87-7538] (ch)

3/23/88 Filed as of 3/21/88, Petitioner State of California's motion to file oversized brief with supporting memorandum of points & authorities, [87-7538] served on 3/21/88 [631484]. (CIVATT) (ogm)

3/23/88 Filed as of 3/21/88, Petitioner State of California's motion requesting judicial notice of U.S. government's publications [87-7538] served on 3/21/88 [631516]. (CIVATT) (ogm)

* * *

4/4/88 Received Orig & 15 Petitioner's Opening Brief, 55 pages and 5 excerpts of record, served on 3/21/88. (Motion pending to file oversized brief). [87-7538] (ch)

4/4/88 Filed order (Deputy Clerk: CB) petitioner's motion to take judicial notice of and the accompanying documents are referred to the panel that will decide the case. Any further filings related to the motion shall also be referred to the panel. [631516-1] Granting petitioner's motion to file oversized brief. On or before 04 Apr. '88, petitioner shall file a brief of not more than 55 pgs. [631484-1] [87-7538] (dl) [Entry date 4/5/88]

4/5/88 Filed as of 4/4/88, Orig & 15 Petitioner's Opening Brief, 55 pages, served on 4/4/88. (Previously received) [87-7538] (ch)

4/5/88 Filed motion of Respondent-Intervenor Rock Creek Limited setting schedule as follows: and deputy clerk order: (Deputy Clerk: CB) granting motion & order setting updated briefing schedule. Petitioner's opening brief and briefs of any amici supporting petitioner are due on or before 04 Apr. '88. Respondent's answering brief is due 30 days from service of petitioner's brief. Intervenor's brief and briefs of any amici supporting respondent are due 14 days from service of respondent's brief. Petitioner's optional reply brief is due 14 days from service of intervenor's brief. Any amici brief submitted to the court must be accompanied by the written consent of all parties to the filing of the brief. [665750-1] [87-7538] (dl) [Entry date 4/6/88]

4/14/88 Filed as of 4/13/88, Orig & 15 Western States (State of Idaho, Alaska, Arizon, [sic] Hawaii, et al.,) Amicus Briefs, 41 pages, served on 4/11/88. (Note: oral ext to 4/11/88 granted by clk's office). [87-7538] (ogm)

4/18/88 Filed as of 4/11/88, Orig & 15 Amicus Brief American Rivers, National Audubon Society, Friends of the Earth, Sierra Club, American Whitewater Affiliation, Friends of the River and Environmental Policy Institute, 35 pages, served on 4/8/88. (Accompanied by Consent Letters of Parties to Filing the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/24/88]

4/19/88 Filed motion's of Amicus for leave to present oral argument and ammend [sic] briefing schedule and deputy clerk order (Deputy Clerk: CB) The motion by amici American Rivers, et al., to participate in oral argument is referred to the panel that will decide the case. The motion by amici American Rivers, et al., for amendments of the briefing schedule is granted. Respondent's Brief is due 30 days from service of the brief of amici American Rivers, et al. Subsequent briefing shall be governed by the 4/5/88 order. [87-7538] (ch)

* * *

6/6/88 Filed as of 6/3/88, Orig & 15 Respondent FERC's Brief, 46 pages, served on 6/1/88. [87-7538] (ch)

6/16/88 Filed Orig & 15 Amici Curiae (Modesto & Turlock Irrigation Districts) Brief, 31 pages, served on 6/15/88. (Accompanied by Letters of consent of the parties to filing the Amicus Brief) (Letters in the body of the brief) [87-7538] (ch) [Entry date 6/17/88] [Edit date 6/23/88]

6/22/88 Filed as of 6/20/88, Orig & 15 Amicus Amicus [sic] Utah Power & Light, Southern CA Edison, Pacific Power, and PG&E', Brief, 25 pages; served on 6/20/88. (Accompanied by consent Letters of Parties to filing the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/23/88]

6/22/88 Filed as of 6/21/88, Orig & 15 Amicus City of Klamath' brief 26 pages; served on 6/17/88. (Accompanied by letters of consent by the parties to filing of the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/23/88]

6/22/88 Filed as of 6/21/88, Orig & 15 Amicus National Hydropower' Brief 19 pages; served on 6/20/88. (Accompanied by letters of consent by parties to filing the Amicus Brief). The letters are contanied [sic] in the brief. [87-7538] (ch) [Edit date 6/23/88]

6/23/88 Filed as of 6/22/88, Orig & 15 Amicus Pacific NW Utilities', Brief 27 pages; served on 6/20/88. (Accompanied by letters of consent from parties to filing the Amicus Brief).* [87-7538] (ch) [Edit date 6/23/88]

6/23/88 Filed as of 6/22/88, Orig & 15 Amicus Edison Electric' Brief, 36 pages; served on 6/20/88. (Accompanied by consent letters of parties to file the Amicus Brief; case file).* [87-7538] (ch) [Edit date 6/24/88]

6/23/88 Received as of 6/22/88, Orig & 15 Respondent FERC's Substitute Brief, 45 pages; served on 6/1/88. Accompanied by a motion for leave to file Substitute Brief. [87-7538] (ch)

6/23/88 Filed as of 6/22/88, Respondent FERC's motion to file Substitute Brief by FERC. [87-7538]; served on 6/21/88 (PROMO) [945638] (ch) [Edit date 6/23/88]

* * *

6/23/88 Filed as of 6/22/88, Orig & 15 Respondent-Intervenor Rock Creek Limited's Brief, 46 pages, 5 supplemental Excerpts of record, served on 6/20/88. [87-7538] (ch) [Edit date 6/23/88]

6/24/88 Filed as of 6/2/88, Rock Creek Limited Partnership's Motion Requesting Judicial Notice; served on 06/20/88. (CIVATT) [87-7538] [948078] (ch)

6/24/88 Filed as of 6/23/88, Orig & 15 Amicus American Public Power Association's Brief 26 pages, served on 6/20/88 (Accompanied by consent letters of parties to file the Amicus Brief; case file)* [87-7538] (ch) [Edit date 6/24/88]

* * *

7/6/88 Filed order (Deputy Clerk: MLM) granting respondents' motion to file substitute corrected briefs received 22 June '88, for briefs originally served 01 June '88. Petitioner's reply brief is due 14 days from the date of this order. [945638-1] The motion of respondent-intervenor Rock Creek Ltd. Partnership requesting judicial notice of attached documents, and any response to that motion, is referred to the panel that considers the merits of the case. [948078-1] [87-7538] (dl) [Entry date 7/7/88]

7/6/88 Filed original and 15 copies Respondent's substitute/corrected brief 45 pages; served on 6/1/88 [87-7538] (dl) [Entry date 7/7/88]

* * *

7/25/88 Filed as of 7/21/88, Orig & 15 Petitioner's Reply Brief, 22 pages, served on 7/21/88. [87-7538] (ch)

8/26/88 Filed as of 8/24/88, Petitioner's motion for an expedited hearing with supporting memorandum of points & authorities [87-7538] served on 8/23/88 [1160078]. (PROMO) (ogm)

9/1/88 Filed order (Deputy Clerk: AHH) Petr's motion for an expedited hearing is denied. Petr is advised that the court calendars are largely current & that this appeal is scheduled to be calendared for hearing as soon as practicable. [1160078-1] [87-7538] (el)

* * *

11/4/88 CALENDARED: SF 12/16/88 9:00 a.m. Courtroom 15 [87-7538] Case has been moved to Ctrm. 3 (dd) (dd) [Edit date 11/8/88]

11/23/88 Filed Orig & 3, Resp's motion to reschedule oral argument to 12/20/88 [87-7538] served on 11/23/88. (PANEL) [1471222] (ch) [Edit date 11/28/88]

11/28/88 Filed order (Deputy Clerk: AW) denying resp's motion to defer oral argument. Oral argument on the merits shall be heard as scheduled, on Fri, 12/16/88 at 9:00 a.m., in SF. [1471222-1] [87-7538] (el)

11/30/88 Received Amicus American Rivers letter dated 11/25/88 re: status of pending motion for oral argument. (PANEL) [87-7538] (ch)

12/6/88 Filed order (HUG, TANG, BOOCHEVER, CJJ) the motion of the Amici to participate in oral argument is granted only on the condition that the State of Calif is willing to relinquish part of the 1/2 hr. allocated to appellants. It will be the responsibility of the Amici to make any such arrangement. [87-7538] (ogm)

12/14/88 Received Respondent-Intervenor Rock Creek Limited letter dated 12/13/88 re: oral argument 12/16/88 in courtroom 3. (PANEL). [87-7538] (ch)

12/16/88 ARGUED AND SUBMITTED TO: HUG, TANG, BOOCHEVER [87-7538] (gb)

* * *

1/5/89 Filed order (HUG, TANG, BOOCHEVER, author) . . . The parties are requested to file simultaneous briefs not to exceed 14 pgs in length, on or before 21 days from the date of this order. Submission of this case is vacated. Upon the filing of the briefs the case is resubmitted. (See case file for complete text) [87-7538] (el)

1/25/89 Filed Amicus (City of Klamath's) motion to file supple memorandum, [87-7538] served on 1/24/89 [1556921]. (PANEL) (ogm) [Entry date 1/26/89]

1/25/89 Received Original and 15 copies Amicus (City of Klamath) supplemental brief of 8 pages, served on 1/24/89. (Note: motion & supplemental brief incorporated in one document). (PANEL) [87-7538] (ogm) [Entry date 1/26/89]

1/26/89 Filed Original and 15 Petitioner's (State of California) supplemental brief of 14 pages, served on 1/26/89. (PANEL) [87-7538] (ogm)

1/26/89 Filed Original and 15 Respondent's (FERC) supplemental brief of 14 pages, served on 1/25/89. (PANEL) [87-7538] (ogm)

1/27/89 Filed Original and 15 Respondent-Intervenor's (Rock Creek Limited) supplemental brief of 11 pages, served on 1/26/89. (PANEL) [87-7538] (ogm)

1/27/89 Case resubmitted on this date to HUG, TANG, BOOCHEVER. (See previous deferral of submission.) [87-7538] (ogm)

2/2/89 Filed Original and 12 Corrected Respondent's (FERC) Supple Briefs, 14 pages, served on 2/1/89. (PANEL) [87-7538] (ogm)

2/2/89 Received Original and 15 Supplemental Briefs of Amicus Curiae (American Rivers, et al.,) 3 pages, served on 1/26/89. (PANEL) [87-7538] (ogm)

2/15/89 Filed order (HUG, author, TANG, BOOCHEVER) The motion for leave to file Supplemental Memorandum filed by Klamath Falls on 1/25/89 is hereby granted. [87-7538] (el)

2/15/89 Filed original and 15 copies City of Klamath Falls' supplemental memorandum, 8 pages, served on 1/24/89. (previoulsy [sic] rec'd). (PANEL already served) [87-7538] (el)

3/13/89 Received State of California additional citations, served on 3/7/89. (PANEL) [87-7538] (ch)

3/14/89 Received Petitioner State of California's extra copy of their additional citation, received 3/13/89. (Case file) [87-7538] (ch)

3/20/89 Received State of California additional citations, served on 3/16/89. (PANEL) [87-7538] (ch)

* * *

6/6/89 FILED OPINION (HUG, author, TANG, BOOCHEVER, CJJ) AFFIRMED FILED AND ENTERED JUDGMENT. [87-7538] (ch) [Entry date 6/8/89]

6/6/89 JS-34 disposition reported. Termination on the merits after oral argument (Affirmed, Enforced) [87-7538] (ch) [Entry date 6/8/89]

7/3/89 MANDATE ISSUED. [87-7538] (ch)

9/5/89 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 89-333 filed on 8/26/89. [87-7538] (el)

2. NINTH CIRCUIT DECISION

[The Ninth Circuit decision is reproduced in Pet. App. 1-13.]

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3. DECLARATORY ORDER (FERC)

[The Order In Response to Request for Declaratory Order and Providing for Hearing of the Federal Energy Regulatory Commission is reproduced at Pet. App. 14-22. The original order appears in the FERC certified list, at pages 514-522 (Ninth Circuit docket entry 2/3/88).]

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4. ORDER DENYING REHEARING (FERC)

[The Order Denying Rehearing of the Federal Energy Regulatory Commission is reproduced in Pet. App. 23-36. The original order appears in the FERC certified list, at pages 714-726 (Ninth Circuit docket entry 2/3/88).]

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5. ORDER ISSUING LICENSE (FERC)

[Included in FERC certified list, at pages 1-14 (Ninth Circuit docket entry 2/3/88).]

23 FERC ¶62, 137

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Joseph M. Keating — Project No. 3189-003

ORDER ISSUING LICENSE (MAJOR)

(Issued April 29, 1983)

Joseph M. Keating (Applicant) filed an application on June 1, 1982, for a license under Part I of the Federal Power Act (Act) to construct, operate, and maintain the Rock Creek Project No. 3189.[1] The project would be located on Rock Creek, a tributary to the South Fork American River, near Placerville, in El Dorado County, California, and would affect U.S. lands under the administration of the U.S. Bureau of Land Management.

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[1] Authority to act on this matter is delegated to the Director, Office of Electric Power Regulation, under §375.308 (1982), of the Commission's regulations, 18 C.F.R. §375.308 (1982), *FERC Statutes and Regulations* ¶30,238. This order may be appealed to the Commission by any party within 30 days of its issuance pursuant to Rule 1902, 18 C.F.R. 385.1902, *FERC Statutes and Regulations* ¶29,052 47 Fed. Reg. 19014 (1982). Filing an appeal and final Commission action on that appeal are prerequisites for filing an application for rehearing as provided in Section 313(a) of the Act. Filing an appeal does not operate as a stay of the effective date of this order or of any other date specified in this order, except as specifically directed by the Commission.

Notice of the application has been published, and comments have been received from interested Federal, State, and local agencies. James H. Cosgrove, Ronald L. Johnston and Philip L. Blair (Petitioners) have been granted intervention. Applicant responded to agency comments and Petitioners' intervention by letter dated November 18, 1982. The significant concerns of the intervenor and commenting agencies are discussed below.

PROJECT DESCRIPTION

The proposed run-of-the-river project would consist of: (1) a low concrete diversion structure; (2) an intake structure; (3) a 500-foot-long concrete pipe; (4) a 3,200-foot-long tunnel; (5) three penstocks; (6) a powerhouse with a total installed capacity of 3,000 kW; (7) a transmission line; and (8) appurtenant facilities. A more detailed project description is contained in ordering paragraph (B).

Safety and Adequacy and Economic Feasibility

The proposed concrete gravity overflow diversion dam will be 80 feet long and 6 feet high. It will impound 2.7 acre-feet of water. Failure of the dam would not affect downstream life or property. It is concluded that the dam will be safe for normal operation if constructed in accordance with the plans and specifications using sound construction techniques.

The proposed run-of-the-river project is economically feasible with a cost of approximately 86 mills per kilowatt hour of energy.[2]

Minimum Flows

The California Department of Fish and Game (DFG) recommended that the following minimum flows should be released from the diversion dam: February through June – 20 cfs; July through September – 11 cfs; and October through January – 15 cfs.

The Applicant agreed to release the flows as recommended by DFG for the months of July through January; however, during the remainder of the year the Applicant proposes to release 15 cfs from February through April and 11 cfs for May and June. The flow recommendations of DFG and the Applicant were based on the results of an Instream Flow Methodology (IFG) study conducted by the Applicant.

Staff believes that low standing crop estimates for fishery resources for Rock Creek suggest that factors other than the quantity of available adult habitat, namely, the lack of suitable spawning and rearing habitat and the wide variability in streamflow, are limiting fish production. Based upon available information, it is concluded that the release of the minimum flows on an interim basis as proposed by the Applicant would not adversely impact

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[2] The proposed project, with its average annual energy generation of 7,000 MWh, will utilize a renewable resource that will save approximately 9,900 barrels of oil or 3,200 tons of coal per year.

the fishery resources of Rock Creek. Therefore, Article 37 requires the Licensee to release the following interim minimum flows from the Rock Creek diversion dam: 11 cfs, May through September, and 15 cfs, October through April. Additionally, Article 38 requires the Licensee to conduct studies to determine a long-term minimum flow for the protection of fishery resources.

The Applicant also proposes to conduct pre- and post-project studies to monitor the fishery of Rock Creek and to identify mitigative and enhancement measures which could be implemented to minimize impacts to the fishery. Such a study would allow for a more detailed assessment of the impacts of the project's operation on fishery resources and a determination of measures, including alternative minimum flow releases, necessary to ensure that adverse impacts to the fishery resources associated with operation of the project would be minimized. Therefore, Article 38 requires the Licensee to conduct studies in cooperation with relevant fish and wildlife agencies, and to determine appropriate minimum flows and other measures necessary to minimize adverse impacts to the fishery of Rock Creek.

Fish Screen

The DFG recommended that the Applicant be required to install a fish screen on the intake structure that would be acceptable to the DFG. The Applicant proposes to install, operate, and maintain a fish screen acceptable to the DFG and the Commission. To ensure the protection of fish populations in the river, Article 43, included in the

license, requires the Licensee to file functional design drawings of a fish screen for Commission approval.

Streamflow Measurement

The DFG recommended that the Applicant install a stream gage recorder immediately downstream of the diversion structure to provide for a continuous record of streamflow releases, and that the data obtained from the gage be submitted to the DFG on an annual basis. Applicant has agreed to locate the stream gage at the first available and acceptable location below the diversion structure and has agreed to submit appropriate flow records to the DFG. Standard Article 8 requires the Licensee to install a gage and to maintain flow records in accordance with requirements set forth by the Commission.

Modifications of Project Facilities and Operation

DFG recommended that a fish ladder, if determined necessary, be installed at the diversion structure. Also, DFG requested that provisions be included in the license to allow for modification of project facilities and operations if unforeseen damages occur to fish and wildlife. Standard Articles 12 and 15, included in this license, provide for changes in project facilities and operations should the need arise.

Recreational Resources

No existing public recreational facilities exist within the project area. Some camping associated primarily with

placer mines occurs in the vicinity of the proposed powerhouse. However, the project area has been posted against trespass for many years, and no appreciable recreational uses have occurred in the project area.

The Applicant, in its Report on Recreational Resources, proposes to: (1) provided for picnicking facilities in the vicinity of the powerhouse, including two picnic tables and fire rings; (2) provide an 8-vehicle parking area; (3) allow access for swimming in the area around the Rock Creek Bridge; (4) permit pedestrian access below the proposed diversion structure; and (5) provide fish stocking on Rock Creek and the South Fork American River to encourage a recreational fishery. The agencies had no comment on the Applicant's proposals.

The proposed recreational plan would provide for the public recreational needs of the project area in the immediate future; therefore, the recreational plan will be approved.

Cultural Resources

Two historic sites, an abandoned mine and the abandoned American River Powerhouse, are located within the project area. The California State Historic Preservation Officer (SHPO) indicated by letter of May 12, 1982, that the remains of the American River Powerhouse are not eligible for listing in the National Register of Historic Places, and that project development would have no effect on significant cultural resources. The Applicant concurs with the conclusions of the SHPO.

Although cultural resources are not expected to be impacted by construction and operation of the project, cultural resources are known to exist in the immediate vicinity of the project. Therefore, in accordance with recent Commission practice, Article 39 requires the Licensee to ensure cultural resources protection.

Report on Fish, Wildlife, and Botanical Resources

The Applicant's Report on Fish, Wildlife, and Botanical Resources, as revised on November 18, 1982, includes measures for the protection and enhancement of the project's fish and wildlife resources. The report specifically provides for measures that were recommended by the DFG for inclusion in the license, including: (1) limiting the rate at which water is diverted from the stream (less than 30 percent of streamflow per hour) to prevent fish stranding; (2) installation of fish screens; (3) the removal of sand and sediment from the impoundment area; (4) raptor-proofing of transmission lines; (5) adequate disposal and stabilization of excavated materials; (6) revegetation of denuded project lands with native species valuable to wildlife; and (7) permitting access to the project for fish and wildlife agencies to ensure proper incorporation and operation of fish and wildlife protective measures. The Report on Fish, Wildlife, and Botanical Resources, as revised on November 18, 1982, will be approved and made part of the license.

No Federally-listed threatened or endangered species would be affected by the proposed action.

Environmental Impacts

Construction activities would result in minor, short-term increases in noise, dust, exhaust emissions and sedimentation and erosion from disturbance of streamed and land surfaces.

Construction and operation of the proposed project would involve the loss of up to 2 acres of vegetation for the duration of the project. An approximately 4,750-foot-long segment of Rock Creek would receive reduced flows, but mitigative measures have been proposed that would protect the aquatic environment.

The California Regional Water Quality Control Board stated that water quality would be adequately protected during construction, operation, and maintenance of the proposed project; thus, water quality certification for the project was waived.

On the basis of the record, and Staff's independent analysis, it is concluded that the issuance of a license for the project would not constitute a major Federal action significantly affecting the quality of the human environment.

Other Aspects of Comprehensive Development

Power from the project will be sold to the Pacific Gas and Electric Company to offset oil-fueled power generation. The powerplant will operate at a 26.6 percent plant factor and will utilize approximately 72 percent of the total available flow. The project is not in conflict with any river basin development plan for the South Fork American River.

It is concluded that, subject to the terms and conditions of this license, the Rock Creek Project is best adapted to a comprehensive plan for development of the South Fork American River Basin for beneficial public uses.

Mining Claims

James H. Cosgrove, Ronald L. Johnston, and Philip L. Blair (Petitioners) stated that their mining claims in the area would be adversely impacted if the powerhouse access road is limited to authorized personnel only and if they are denied access. Applicant responded stating that the mining claims were not valid; however, Applicant has agreed that all valid claim owners would be considered authorized personnel and would be granted access. The Bureau of Land Management has also stated that all mining claimants are guaranteed access through the Rock Creek Project right-of-way.

It is ordered that:

(A) This license is issued to Joseph M. Keating under part I of the Federal Power Act (Act) for a period of 50 years, effective the first day of the month in which this order is issued, for the construction, operation, and maintained of the Rock Creek Project No. 3189, located on Rock Creek in El Dorado County, California, and occupying lands of the United States under the administration of the Bureau of Land Management. This license is subject to the terms and conditions of the Act, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Act.

(B) The Rock Creek Project No. 3189 consists of:

(i) All lands, to the extent of the licensee's interests in those lands, constituting the project area and enclosed by the project boundary. The project area and boundary are shown and described by certain exhibits that form part of the application for license and that are designated and described as:

EXHIBIT	FERC NO.	SHOWING
G-1	3189-8	Location Map
G-2	3189-9	Project Features
G-3	3189-10	Project Boundary
G-4	3189-11	Project Boundary
G-5	3189-12	Project Boundary

(ii) Project works consisting of:

(1) a 6-foot-high, 80-foot-long concrete and rock overflow diversion structure at elevation 1,265 feet with 3-foot-high flashboards, and impounding; (2) a 0.36-acre power forebay reservoir with a usable capacity of 5.2 acre-feet; (3) a 500-foot-long, 72-inch-diameter concrete pipe; (4) a 3,220-foot-long, 9-foot-diameter unlined horseshoe tunnel; (5) three 400-foot-long steel penstocks, (two 36-inch-diameter penstocks and one 30-inch-diameter penstock); (6) a concrete block powerhouse at elevation 1,052 feet containing three mobile crossflow generating units, two rated at 1,125 kW each and one rated at 750 kW for a total of 3,000 kW; (7) three 100-foot-long, 4.16-kV generator leads; (8) a 3000/3750 kVA 4.16/12.0 kV transformer; (9) a 75-foot-long, 12-kV transmission line; and (10) appurtenant facilities.

The location, nature, and character of these project works are generally shown and described by the exhibits cited above and more specifically shown and described by

certain other exhibits and reports that also form a part of the application for license and that are designated and described as:

EXHIBIT	FERC NO. 3189 –	SHOWING
F-1	1	Plan View Powerhouse
F-2	2	Powerhouse Foundation Section
F-3	3	Powerhouse Elevation
F-4	4	Overflow Diversion Structure
F-5	5	Cross Sections of Tunnel and Pipeline
F-6	6	Portal Details
F-7	7	Mobile Turbine Conceptual Details

Exhibit A – Section D entitled "Powerhouse and Transmission Line", on pages A-3 and A-4, filed June 1, 1982.

Exhibit E

The *Report on Fish, Wildlife, and Botanical Resources*, filed June 1, 1982, and revised November 18, 1982, (specifically pages 3 through 7 of the revisions, paragraphs d through l and n).

The *Reports on Recreational Resources*, filed June 1, 1982, consisting of: one page of text, numbered E-38 (specifically Section 9.5 entitled "Proposed Measures or Facilities," Items No. 1 through 5).

(iii) All of the structures, fixtures, equipment, or facilities used or useful in the operation or maintenance of the project and located within the project boundary, all portable property that may be employed in connection

with the project, located within or outside the project boundary, as approved or acquiesced in by the Commission, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) Exhibit A (Section D), Exhibit F, Exhibit G, the Report on Fish, Wildlife, and Botanical Resources, and the Report on Recreational Resources of Exhibit E, designated in ordering paragraph (B) above, are approved and made a part of the license.

(D) This license is also subject to the terms and conditions set forth in Form L-2 (revised October, 1975), entitled "Terms and Conditions of License for Unconstructed Major Project Affecting Lands of the United States," designated as Articles 1 through 32, attached to and made a part of this license. The license is also subject to the following additional articles:

Article 33. The Licensee shall file with the Commission's Regional Engineer and the Director, Office of Electric Power Regulation, one copy each of the contract drawings and specifications for pertinent features of the project such as water retention structures, powerhouse and water conveyance structures, at least 60 days prior to start of construction. The Director, Office of Electric Power Regulation, may require changes in the plans and specifications to ensure a safe and adequate project.

Article 34. Licensee shall file for approval as-built Exhibits A, F, and G within one year of completion of construction describing the project as constructed.

Article 35. Licensee shall commence construction of the project within 2 years of the issuance date of this license and complete construction within 4 years of the license issuance date.

Article 36. The Licensee shall review and approve the design of contractor-designed cofferdams and deep excavations prior to the start of construction and shall ensure that construction of cofferdams and deep excavations are consistent with the approved design. At least 30 days prior to start of construction of the cofferdam, the Licensee shall file with the Commission's Regional Engineer and Director, Office of Electric Power Regulation, one copy of the approved cofferdam construction drawings and specifications and a copy of the letter of approval.

Article 37. Licensee shall discharge from the Rock Creek diversion dam interim continuous minimum flows in accordance with the following schedule or the inflow to the reservoir, whichever is less: May through September – 11 cubic feet per second (cfs) and October through April – 15 cfs. These flows may be temporarily modified if required by operating emergencies beyond the control of the Licensee, for studies required by Article 38, and for short periods for fishery management purposes upon mutual agreement between the Licensee and the California Department of Fish and Game.

Article 38. The Licensee shall, in consultation with the U.S. Fish and Wildlife Service and the California Department of Fish and Game, conduct studies to determine the minimum flow release and other measures needed to ensure protection and enhancement of the fishery

resources in Rock Creek between the dam and the powerhouse. Further, Licensee shall, within 1 year from the date of issuance of this license, file a report of its findings and, for Commission approval, recommendations for a minimum flow release and for other fishery protection and enhancement measures needed in Rock Creek between the dam and powerhouse. Agency letters of comment on the report and recommendations shall be included in this filing.

Article 39. The Licensee shall prior to the commencement of any future construction at the project, consult with the California State Historic Preservation Officer (SHPO) about the need for any cultural resource survey and salvage work. The Licensee shall make available funds in a reasonable amount for any such work as required. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Licensee shall consult with the SHPO to develop a mitigation plan for the protection of significant archeological or historical resources. If the Licensee and the SHPO cannot agree on the amount of money to be expended on archeological or historical work related to the project, the Commission reserves the right to require the Licensee to conduct, at its own expense, any such work found necessary.

Article 40. The Licensee shall pay the United States the following annual charges:

(a) For the purpose of reimbursing the United States for the cost of administration of Part I of the Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 4,000 horsepower.

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of approximately 11.61 acres of its lands, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time.

Article 41. Pursuant to Section 10(d) of the Act, after the first 20 years of operation of the project under license, a specified reasonable rate of return upon the new investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. One half of the project surplus earnings, if any, accumulated after the first 20 years of operation under the license, in excess of the specified rate of return per annum on the net investment, shall be set aside in a project amortization reserve account at the end of each fiscal year. To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year after the first 20 years of operation under the license, the amount of that deficiency shall be deducted from the amount of any surplus earnings subsequently accumulated, until absorbed. One-half of the remaining surplus earnings, if any, cumulatively computed, shall be set aside in the project amortization reserve account. The amounts established in the project amortization reserve

account shall be maintained until further order of the Commission.

The annual specified reasonable rate of return shall be the sum of the annual weighted costs of long-term debt, preferred stock, and common equity, as defined below. The annual weighted cost for each component of the reasonable rate of return is the product of its capital ratio and cost rate. The annual capital ratio for each component of the rate of return shall be calculated based on an average of 13 monthly balances of amounts properly includable in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rates for long-term debt and preferred stock shall be their respective weighted average costs for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10 year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 42. (a) In accordance with the provisions of this Article, the Licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain other types of use and occupancy, without prior Commission approval. The Licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the Licensee shall also have continuing responsibility to supervise and control the uses and occupancies

for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the Licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, cancelling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The types of use and occupancy of project lands and waters for which the Licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more *than 10 watercraft at a time and where said facility is intended to serve single family-type dwellings;* (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the Licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The Licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the uses and occupancies for which it grants permission are maintained in good repair and comply with applicable State

and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the Licensee shall: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline. To implement this paragraph (b), the Licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the Licensee's costs of administering the permit program. The Commission reserves the right to require the Licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The Licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which all necessary State and Federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a

project reservoir. No later than January 31 of each year, the Licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The Licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary State and Federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary Federal and State water quality certificates or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary Federal and State approvals have been obtained; (5) private or public marinas that can accommodate no more that [sic] 10 watercraft at a time and are located at least one-half mile from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from the edge of the project reservoir at normal maximum surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause

(d)(7) in any calendar year. At least 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must file a letter to the Director, Office of Electric Power Regulation, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any Federal or State agency official consulted, and any Federal or State approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the Licensee to file an application for prior approval, the Licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraphs (c) or (d) of this article:

(1) Before conveying the interest, the Licensee shall consult with Federal and State fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the Licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with

overall project recreational use; and (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project.

(4) The Commission reserves the right to require the Licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

Article 43. Licensee shall, within 6 months following the issuance of this license, file for Commission approval, functional design drawings of a fish screen for the intake of the Rock Creek Project, prepared in consultation with the U.S. Fish and Wildlife Service and the California

Department of Fish and Game. Agency comments on the proposed fish screen design shall be included in the filing. Within 6 months after completion of construction of the screen, Licensee shall file as-built drawings with the Commission.

(E) The Licensee's failure to file a petition appealing this order to the Commission shall constitute acceptance of this license. In acknowledgment of acceptance of this license, the license shall be signed for the Licensee and returned to the Commission within 60 days from the date of issuance of this order.

/s/ Lawrence R. Anderson
Lawrence R. Anderson
Director, Office of Electric
Power Regulation

[Attestation omitted.]

Form L-2
(Revised October, 1975)

FEDERAL POWER COMMISSION

TERMS AND CONDITIONS OF LICENSE FOR UNCONSTRUCTED MAJOR PROJECT AFFECTING LANDS OF THE UNITED STATES

Article 1. The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

Article 2. No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: *Provided, however,* That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

Article 3. The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alternation

or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alternation, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alternation as the Commission may direct.

Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

Article 4. The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision of the Regional Engineer, Federal Power Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alternations to the project. Construction of the project works or any feature or alternation thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and

regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

Article 5. The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

Article 6. In the event the project is taken over by the United States upon the termination of the license as provided in Section 14 of the Federal Power Act, or is

transferred to a new licensee or to a non-power licensee under the provisions of Section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: *Provided*, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Article 8. The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric

energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

Article 9. The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

Article 10. The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the

Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

Article 11. Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

Article 12. The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per

specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

Article 13. On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

Article 14. In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

Article 15. The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

Article 16. Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably

required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article. This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

Article 17. The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

Article 18. So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the propose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: *Provided,* That the Licensee may reserve from public access such portions of the project

waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

Article 19. In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

Article 20. The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alternation of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

Article 21. Timber on lands of the United States cut, used, or destroyed in the construction and maintenance

of the project works, or in the clearing of said lands, shall be paid for, and the resulting slash and debris disposed of, in accordance with the requirements of the agency of the United States having jurisdiction over said lands. Payment for merchantable timber shall be at current stumpage rates, and payment for young growth timber below merchantable size shall be at current damage appraisal values. However, the agency of the United States having jurisdiction may sell or dispose of the merchantable timber to others than the Licensee: *Provided*, That timber so sold or disposed of shall be cut and removed from the area prior to, or without undue interference with, clearing operations of the Licensee and in coordination with the Licensee's project construction schedules. Such sale or disposal to others shall not relieve the Licensee of reasonability for the clearing and disposal of all slash and debris from project lands.

Article 22. The Licensee shall do everything reasonably within its power, and shall require its employees, contractors, and employees of contractors to do everything reasonably within their power, both independently and upon the request of officers of the agency concerned, to prevent, to make advance preparations for suppression of, and to suppress fires on the land to be occupied or used under the license. The Licensee shall be liable for and shall pay the costs incurred by the United States in suppressing fires caused from the construction, operation, or maintenance of the project works or of the works appurtenant or accessory thereto under the license.

Article 23. The Licensee shall interpose no objection to, and shall in no way prevent, the use by the agency of the United States having jurisdiction over the lands of the

United States affected, or by persons or corporations occupying lands of the United States under permit, of water for fire suppression from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license, or the use by said parties of water for sanitary and domestic purposes from any stream, conduit, or body of water, natural or artificial, used by the Licensee in the operation of the project works covered by the license.

Article 24. The Licensee shall be liable for injury to, or destruction of, any building, bridges, roads, trails, lands, or other property of the United States, occasioned by the construction, maintenance, or operation of the project works or of the works appurtenant or accessory thereto under the license. Arrangements to meet such liability, either by compensation for such injury or destruction, or by reconstruction or repair of damaged property, or otherwise, shall be made with the appropriate department or agency of the United States.

Article 25. The Licensee shall allow any agency of the United States, without charge, to construct or permit to be constructed on, through, and across those project lands which are lands of the United States such conduits, chutes, ditches, railroads, roads, trails, telephone and power lines, and other routes or means of transportation and communication as are not inconsistent with the enjoyment of said lands by the Licensee for the purposes of the license. This license shall not be construed as conferring upon the Licensee any right of use, occupancy, or enjoyment of the lands of the United States other than for the construction, operation, and maintenance of the project as stated in the license.

Article 26. In the construction and maintenance of the project, the location and standard of roads and trails on lands of the United States and other uses of lands of the United States, including the location and condition of quarries, borrow pits, and spoil disposal areas, shall be subject to the approval of the department or agency of the United States having supervision over the lands involved.

Article 27. The Licensee shall make provision, or shall bear the reasonable cost, as determined by the agency of the United States affected, of making provision for avoiding inductive inference between any project transmission line or other project facility constructed, operated, or maintained under the license, and any radio installation, telephone line, or other communication facility installed or constructed before or after construction of such project transmission line or other project facility and owned, operated, or used by such agency of the United States in administering the lands under its jurisdiction.

Article 28. The Licensee shall make use of the Commission's guidelines and other recognized guidelines for treatment of transmission line rights-of-way, and shall clear such portions of transmission line rights-of-way across lands of the United States as are designated by the officer of the United States in charge of the lands; shall keep the areas so designated clear of new growth, all refuse, and inflammable material to the satisfaction of such officer; shall trim all branches of trees in contact with or liable to contact the transmission lines; shall cut and remove all dead or leaning trees which might fall in contact with the transmission lines; and shall take such other precautions against fire as may be required by such

officer. No fires for the burning of waste material shall be set except with the prior written consent of the officer of the United States in charge of the lands as to time and place.

Article 29. The Licensee shall cooperate with the United States in the disposal by the United States, under the Act of July 31, 1947, 61 Stat. 681, as amended (30 U.S.C. sec. 601, *et seq.*), of mineral and vegetative materials from lands of the United States occupied by the project or any part thereof: *Provided,* That such disposal has been authorized by the Commission and that it does not unreasonably interfere with the occupancy of such lands by the Licensee for the purposes of the license: *Provided further,* That in the event of disagreement, any question of unreasonable interference shall be determined by the Commission after notice and opportunity for hearing.

Article 30. If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency

having jurisdiction over its lands or the Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of non-power facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

Article 31. The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

Article 32. The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

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6. Decision 1596 (SWRCB)

[Attached as Exhibit A to Cal. Request for Rehearing, included in FERC certified list, at pages 599-703 (Ninth Circuit docket entry 2/3/88).]

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Applications 26380 and 27353	)	DECISION 1596
JOSEPH M. KEATING,	)	SOURCE: Rock Creek
Applicant;	)	COUNTY: El Dorado
CALIFORNIA DEPARTMENT OF FISH AND GAME,	)	
Protestant.	)	

DECISION APPROVING APPLICATIONS 26380 AND 27353

BY BOARD VICE CHAIRMAN NOTEWARE:

Joseph M. Keating having filed Applications 26380 and 27353 for permits to appropriate unappropriated water from Rock Creek; protests having been received; a hearing having been held on September 14, 1983; the Board having considered all evidence in the record; the Board finds as follows:

1. *Scope of Applications*

Both Application 26380 and Application 27353 are for permits to appropriate water from Rock Creek by direct diversion for the purpose of power generation. Application 26380 is for diversion of 100 cfs from January 1 through December 31 of each year, and Application 27353

is for diversion of 140 cfs from October 1 through May 31 of each year, for a combined diversion of 100 cfs from June 1 through September 30 and 240 cfs from October 1 through May 31. Under both applications the point of diversion is from Rock Creek with in the NE1/4 of NW1/4 of Section 21, T11N, R11E, MDB&M and the point of return is to Rock Creek at its confluence with the South Fork American River within the SW1/4 of SW1/4 of Section 20, T11N, R11E, MDB&M.

2. *Project Description*

a. Water will be diverted from Rock Creek approximately one mile upstream of the confluence of Rock Creek with the South Fork American River. The water will be transported through a 500-foot-long, 72-inch-diameter concrete pipe into a 3,200-foot-long, 8-foot x 9-foot horseshoe shaped tunnel, then into three existing 400-foot-long penstocks, then into a powerhouse, and finally returned to the South Fork American River using portions of an existing tailrace. Diversion is proposed to be by a 6-foot-high, 80-foot-long rock and concrete diversion dam which will create a 5.2 acre-foot forebay reservoir with a surface area of 0.36 acre. Alternatively, diversion will be by a 12- to 13- foot high dam which will create a 13.5 acre-foot reservoir with a surface area of 0.85 acre.

b. The powerhouse will be built on the remaining foundation of a prior powerhouse. The project will use two penstocks formerly used in association with the prior powerhouse.

c. A seventh-five foot long transmission line will connect the powerhouse to an existing Pacific Gas and Electric transmission line.

d. The powerhouse will house three mobile turbine/generator units, one with 750 kilowatts capacity and two with 1,125 kilowatts capacity, for a total capacity of 3,000 kilowatts. Together, the three units are capable of generating an average of almost 7,000 megawatt-hours of electricity annually.

3. *Protests*

a. The California Department of Fish and Game and the Northern California Council of Fly Fishing Clubs (NCCFFC) protested the applications. Both protests are on the grounds that:

(1) The project as proposed will not best preserve the public interest, and

(2) The project as proposed will have an adverse environmental impact.

The Department of Fish and Game alleges that Rock Creek supports a population of resident rainbow trout and serves as a source of fish for the South Fork American River. The Department seeks to have flows retained in Rock Creek to protect the beneficial use of the stream by fish. An authority, it cites Water Code §§1243 and 1257 and Fish and Game Code §§5937 and 16083.

The NCCFFC alleged that Rock Creek provides habitat and riparian vegetation, and sustains wild trout populations and habitat. It sought to have flows retained in Rock Creek to protect the beneficial uses of the stream.

As authority, NCCFFC cited Water Code §§100, 1243, and 1257, and Fish and Game Code §5937.

b. With the agreement of the NCCFFC (made by telephone on August 23, 1983) the hearing was scheduled for September 14, 1983. The Board received NCCFFC's Notice of Intent to Appear on September 7, 1983. However, no representative of NCCFFC appeared, and NCCFFC failed to leave messages or communicate to the Board or its staff that it would not appear.

Pursuant to 23 Cal.Admin.Code §731, the Board on September 15, 1983, notified NCCFFC's representative by telegram that he had five days in which to show good cause for NCCFFC's failure to appear. On September 20, 1983, the representative offered as his showing of good cause statements that (1) he was require to appear in court on September 14, 1983; (2) his witness was not qualified to address the written testimony that had been submitted; (3) he had been unable to reach a Board staff member to give notice NCCFFC would be unrepresented at the hearing. None of these statements constitutes good cause for NCCFFC's failure to appear at the hearing. Consequently, NCCFFC's protest was dismissed by the hearing officer.

4. *Need for the Project*

The project will have a maximum installed capacity of 3 megawatts (MW) and will generate between 6,400,000 and 6,700,000 kilowatt hours (KWh) in an average year. The applicant expects to sell the project's power to Pacific Gas and Electric (PG&E) under the federal Public Utilities Regulatory Policies Act of 1978 (16 U.S.C.

§824a-3). The project will meet approximately 0.2 percent of PG&E's projected need for new capacity and 0.05 percent of PG&E's projected need for new energy supplies in 1994.

The Energy Commission has adopted preferential ranking among technologies for meeting future electricity needs. The ranking places small hydroelectric projects (including this project) in the third of six priority ranks. No evidence was received that sufficient projects will be available to meet all the projected needs of the PG&E service area in 1994 with alternatives listed in the first three priority ranks. Therefore, a need will exist for the capacity and energy to be provided by the project.

5. *Economic Feasibility of the Project*

a. If this project is not economically feasible, the water allocated to the project by water right permits will not be put to beneficial use. Water allocated under a water right must be put to beneficial use. Water Code §§1240, 1375, 1396, 1397, 1410. Issuance of a permit to an infeasible would make the water unavailable for appropriation by others who might be able to establish a feasible project, resulting in a failure to put the appropriated water to beneficial use. In order to ensure that any water allocated to the applicant under a water right permit is put to beneficial use, the Board must inquire into the project's financial feasibility.

b. Construction cost of the project is estimated at $3,200,000. Annual costs are estimated at $375,000 to $494,000. These costs must be compared to the project's revenues in order to determine whether it is or may be

economically feasible. If the project is not economically feasible it is unlikely to receive full financing.

The amount of project revenues will depend upon the price that PG&E will pay for the project's energy and capacity. This in turn depends on (1) the price PG&E must pay for the project's power under the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §824a-3, and (2) the type of contract PG&E offers the applicant for this project's power.

Currently PG&E has a short-term standard offer purchase contract approved by the Public Utilities Commission under which it could contract to buy the project's power. The price terms under this contract are adjusted approximately every quarter. Prices vary with the season and time of day. For power generated in the months of October through April PG&E was paying, at the time of the hearing, 6.059¢/KWh, plus 0.12¢/KWh for as-delivered capacity, for a total payment of 6.179¢/KWh.

The Board received evidence that at the time of the hearing, PG&E had a long-term standard purchase contract before the Public Utilities Commission for review. Under the proposed contract prices would be agreed upon in advance, for up to twenty years. One option would in effect average the projected increase, over time, in avoided cost, and pay producers an averaged price. Thus, the producer would be expected to receive more than the avoided cost in the near term and less than the avoided cost in the long term. The amount that PG&E will pay, however, is speculative. The draft contract which the applicant provided to the Board during the hearing lists a price of 7.09¢/KWh for energy delivered

under a 20-year contract and 6.19¢/KWh for energy delivered under a 15-year contract. The additional amount payable for as-delivered capacity is not shown. The applicant, however, estimates that PG&E may pay a total of 8.5¢/KWh including capacity. Under the proposed contract this would mean a payment of 1/41-2.31¢/KWh for as-delivered capacity. Since the project will produce the bulk of its power during the October through April period when power is plentiful and capacity is less valuable, this estimated payment for capacity may not be attainable.

c. Based on the amount of electricity the project will generate annually, the project's projected annual costs, and the prices being paid by PG&E currently for power under its approved short-term contract, the project's annual net revenues would range from a loss of $99,000 to a profit of $40,000. Under the proposed long-term contract, assuming a total purchase price of 8.5¢/KWh, the project's annual net revenues would be a profit ranging from $544,000 to $569,000. Thus, the project economically will be marginal under the short-term contract and will be feasible under the long-term contract assuming a price of 8.5¢/KWh.

d. Because the project's economic feasibility and, therefore, its likelihood of putting water to beneficial use, is dependent on the price that PG&E will pay for the project should be contructed [sic]. Consequently, it will place terms and conditions on the permits for the project to ensure that it is not constructed unless it will put the appropriate water to beneficial use.

6. *Availability of Unappropriated Water*

a. Because the only gaging station on Rock Creek was not installed until 1982, the applicant's hydrologist estimated the amount of water available in the Rock Creek watershed based on published data from other watersheds though to be typical of the Rock Creek watershed. Evidence was presented that high flows may be longer in duration than those estimated in the applicant's hydrology study. This is speculative.

While the stream does not continuously carry a flow as high as the requested diversion rates, and some flows will have to be bypassed for fishery and riparian vegetation protection, sufficient water appears available to justify the requested diversion rates.

b. Upstream development should be protected in the Rock Creed watershed. Such development may arise in the future, and likely will require water for domestic and stockwatering uses. Such uses should, in the public interest, be given higher priority than power uses. Consequently, the permits should be made subject to upstream appropriations for these uses within the watershed.

7. *Effect on the Fishery*

a. Rock Creek is important because it provides fishery recruitment to the South Fork American River and because it directly provides adult trout for angler harvest. Because Rock Creek provides fishery recruitment for the South Fork American River (a navigable waterway), diversion of water needed for fishery use from Rock Creek may affect fishery uses of the river. Under *National*

Audubon Society v. Superior Court, 33 Cal.3d 419, 189 Cal.Rptr. 346 (1983), fishery uses of the river appear to be protected by the public trust. Consequently, the Board has considered the effect of the applicant's proposed diversion on the uses of the South Fork American River and herein, to the extent feasible and within the standard of reasonableness contained in California Constitution Article X, §2, attempts to avoid or minimize harm to the fishery of the South Fork American River.

b. The Board's objective in mitigating the effects of this project on the fishery of Rock Creek and South Fork American River is to protect the existing resources of Rock Creek at natural, preproject, levels. This objective is in accordance with the policy of the Department of Fish and Game.

c. In order to determine the minimum flows to be bypassed by the project for protection of the fishery and riparian vegetation, the applicant's consultant performed fishery studies on Rock Creek using the U.S. Fish and Wildlife Service's Instream Flow Incremental Methodology three-flow methodology, known as IFG-4, population estimates, and hydrology information. Based on the studies, the Department of Fish and Game, the applicant, and the Federal Energy Regulatory Commission arrived at three different minimum flows for Rock Creek. Evidence was presented that the instream flow study is deficient. The Board finds that it is deficient. Because of the deficiencies, no valid basis exists for the minimum flows proposed by the applicant, the Federal Energy Regulatory Commission, or the Department of Fish and Game. It is deficient in the following ways.

(1) It modeled less than half of the habitat types to be affected by the project. The types which should have been modeled include spawning habitat and the low gradient riffle habitat in the upper part of the affected reach.

(2) The side channel in the stream segment modeled by the applicant's contractor was not modeled, and should have been modeled.

(3) The upper portion of the reach of the creek affected by the project through inundation or reduced flows should be modeled.

d. The fishery population estimates were made using electroshocking techniques. Evidence was presented that some of the electroshocking data is questionable.

e. Since the bases for setting a minimum bypass for instream flows are deficient, the Department of Fish and Game agrees that the flows may, pending further study, be set at the same levels as the Federal Energy Regulatory Commission has required on an interim basis in the license it issued to the applicant. These flows are 15 cfs during October through April and 11 cfs during May through September. The Department requests that the Board reserve jurisdiction to change the flows after the applicant does a new IFG-4 study or supplements the old one. The Board finds that a new study should be done before the applicant commences any construction in Rock Creek, diverts water from Rock Creek, or otherwise disturbs the natural flow and habitat of Rock Creek except to accomplish the study.

f. A fish screen will be needed at the diversion site to prevent fish from being diverted into the power tunnel and through the power generators. The size and placement of the screen will depend on its type. The screen should be approved by the Department of Fish and Game.

g. The applicant proposes to stock trout in Rock Creek. Department of Fish and Game has stated that it has no objection to stocking if the project is mitigated to ensure that no net loss of natural trout occurs.

h. The applicant should do the new or supplemental IFG-4 study and develop minimum instream flow requirements in cooperation and consultation with the Department of Fish and Game.

8. *Geo-Physical Effect of the Proposed Construction*

a. The applicant proposes to excavate a nearly horizontal tunnel, 3,200 feet long. Except in zones of decomposed granite, the applicant plans to leave the tunnel unlined. In areas where decomposed granite is encountered, the applicant will gunite line the tunnel. The water in the tunnel will be lightly pressurized. If it is unlined, excessive water losses may occur in the tunnel. Therefore the applicant should install measuring devices capable of detecting losses in the conveyance system including the tunnel. The maximum loss that should be allowed is eight percent. If losses exceed eight percent, the applicant should take steps to reduce losses to eight percent or less.

b. To ensure that the applicant complies with construction and operating mitigation measures imposed by

other agencies, the permit should contain a term which will require all necessary federal, state, and local approvals before commencement of construction.

9. *Compliance With the California Environmental Quality Act*

The Board as lead agency has prepared and approved a mitigated Negative Declaration for the applicant's project in accordance with the requirements of the California Environmental Quality Act (Public Resources Code §§21000 et seq.). After the Board adopts this decision it will file a Notice of Determination with the Secretary for Resources. Consideration of the Mitigated Negative Declaration and Initial Study, inclusion of the Negative Declaration's mitigation measures in the water right permits, and filing of the Notice of Determination will satisfy the Board's responsibilities under the California Environmental Quality Act.

10. *Right of Access*

The applicant has not yet obtained rights of access to all of the lands needed for the project. A question exists whether the applicant will obtain all the necessary rights. Consequently, the Board's standard term 22, Right of Access, should be included in the water right permits issued for this project.

11. *Time Limits*

Twelve months after the permit is issued is a reasonable time period for the applicant to obtain financing and

commence construction. Construction can be completed within three years after the permit is issued. Complete application of the appropriated water to the authorized use can be accomplished by June 1 of the seventh year after construction is completed. Therefore, the permits issued for this project should contain terms and conditions setting these time periods as limits within which the applicant may obtain financing and commence construction, complete construction, and completely apply the appropriated water to the authorized use.

12. *Conclusion*

Based on the foregoing findings, the Board concludes that Applications 26380 and 27353 should be approved for power purposes and permits issued to Joseph M. Keating subject to the terms and conditions in the following order.

ORDER

IT IS HEREBY ORDERED that Applications 26380 and 27353 be approved for power purposes and that permits be issued to the applicant subject to vested rights. The permit shall contain standard permit terms 6, 10, 11, 12 and 13 (a copy of the Board's standard permit terms is available upon request) in addition to the following terms and conditions.

1. The water appropriated under the permit issued on Application 26380 shall be limited to the quantity which can be beneficially used and shall not exceed 100 cubic feet per second by direct diversion from Rock

Creek, to be diverted from January 1 through December 31 of each year.

The equivalent of the continuous flow allowance for any 14-day period may be diverted in a shorter time, provided there be no interference with other rights.

2. The water appropriated under the permit issued on Application 27353 shall be limited to the quantity which can be beneficially used and shall not exceed 140 cubic feet per second by direct diversion from Rock Creek, to be diverted from October 1 through May 31 of each year.

Th equivalent of the continuous flow allowance for any 14-dav period may be diverted in a shorter time, provided there be no interference with other rights.

3. Water diverted under this permit is for nonconsumptive uses and is to be released to Rock Creek at its confluence with the South Fork American River within the SW1/4 of SW1/4 of Section 20, T11N, R11E, MDB&M.

4. Permittee shall obtain full project financing and commence construction of the project within two years after the date of this permit and shall thereafter prosecute the project with reasonable diligence. In no event shall permittee commence construction in Rock Creek or divert any water from Rock Creek unless it has financing to completely construct the project.

5. Project construction work shall be completed by December 1 of the fourth year after the date of this permit.

6. Permittee shall make complete application of the water to the authorized use by December 1, 1995.

7. All rights and privileges to appropriate water for power purposes under this permit and any subsequently issued license are subject to depletions resulting from future upstream appropriation for domestic and stockwatering uses within the watershed. Such rights and privileges may also be subject to future upstream appropriations for uses within the watershed other than domestic and stockwatering if and to the extent that the Board determines, pursuant to Water Code §§100 and 275, that the continued exercise of the appropriation for power purposes is unreasonable in light of such proposed uses. Any such determination shall be made only after notice to permittee or licensee of an application for any such future upstream appropriation and the opportunity to be heard; provided that a hearing, if requested, may be consolidated with the hearing on such applications.

8. For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

a. From October 1 through April 30, a minimum of 15 cubic feet per second;

b. From May 1 through September 30, a minimum of 11 cubic feet per second.

The total streamflow shall be bypassed whenever it is less than the amount designated for that period.

No water shall be diverted under this permit until permittee has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring these bypass flows.

9. a. Permittee, in consultation and cooperation with the Department of Fish and Game, shall conduct an

Instream Flow Incremental Methodology IFG-4 flow study within the reach of Rock Creek from 550 feet upstream of the diversion dam downstream to the point of return of water from the proposed powerhouse at the confluence of Rock Creek with South Fork American River. The study shall evaluate the effects of flow levels on trout life history stages and on habitat needed to support the different life stages.

The study shall model all representative habitats of the affected reach of Rock Creek including the habitats not previously modeled by the applicant's contractor. (These include the spawning habitat, the low gradient riffle habitat in the upper part of the affected reach, and the side channel of the stream segment previously modeled by the permittee's contractor.) To the extent possible, and with the agreement of the Department of Fish and Game, the permittee may use the original IFG-4 study to supplement the new study.

b. All field work elements of the study described in a. shall be completed prior to commencement of any construction work in the channel and overflow areas of Rock Creek within the reach described in a. No diversion of water shall be made from Rock Creek until the study described in a. is completed and the results evaluated.

c. The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 8 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after evaluating

the results of the study described in a. and after notice to interested parties and opportunity for hearing.

10. In accordance with Section 1601, Section 1603 and/or Section 6100 of the Fish and Game Code, no work shall be started on the diversion works and no water shall be diverted until permittee has entered into a stream or lake alteration agreement with the Department of Fish and Game and/or the Department has determined that measures to protect fishlife have been incorporated into the plans for construction of such diversion works. Construction, operation, and maintenance costs of any required facility are the responsibility of permittee.

11. No construction shall be commenced and no water shall be used under this permit until all necessary federal, state and local approvals have been obtained, including compliance with any applicable Federal Energy Regulatory Commission requirements.

12. a. Measuring devices shall be installed by permittee that are capable of measuring water losses and gains in the closed conduit system from the point of diversion to the point of return.

b. Loss data shall be tabulated for the period October 1 of one year through September 30 of the succeeding year in daily increments and shall be submitted to the State Water Resources Control Board by October 15 of each year.

c. If the loss exceeds eight percent of the amount of flow being diverted from Rock Creek, permittee shall take whatever steps are necessary to reduce the loss to eight percent or less. Failure of the permittee to

achieve that level of loss within two years after loss in excess of eight percent was first detected shall constitute a violation of this permit term.

13. This permit shall not be construed as conferring upon the permittee right of access to the proposed point of diversion, conveyance facilities or the powerhouse and appurtenant structures.

14. No major construction activities shall occur in the flowing water.

15. Construction activities adjacent to streams and any necessary erosion control measures shall be completed prior to heavy runoff periods.

16. Material from road and other construction work shall not be deposited where it could be eroded and carried to the stream by surface runoff or high stream flows.

17. Where working areas encroach live streams, barriers shall be constructed which are adequate to prevent the flow of turbid water into the stream.

18. During construction, cofferdams shall segregate the zone of construction activity from streamflow. Provisions shall be made to allow streamflow to bypass the construction zone with a temporary diversion conduit.

19. Permittee shall provide automatic emergency shut off gates or valves at the beginning of the penstock capable of discontinuing the flow of water in the event of penstock failure or to dewater the penstock for maintenance purposes.

20. All construction activities required to build the dam, tailrace, and tunnel intake portal shall be scheduled during low flow periods.

21. Provisions shall be made to prevent spillage or disposal of oils, fuels, or associated containers in the construction zone. Disposal shall only be at approved locations.

22. To minimize the opportunity for contamination of the environment from machinery lubricants, and coolants, all electrical generation equipment shall be contained inside a structure.

23. All access roads shall be provided with drainage control measures to prevent erosion of road surfaces.

24. Exposed and unstable soils shall be stabilized by physical means until the soil can be successfully revegetated.

25. A fire protection plan shall be developed between the applicant and the Bureau of Land Management prior to project construction. Among the items to be considered are transmission line safety and protection, a fire hydrant valve on the penstock, and other fire prevention criteria that may be incorporated into the design, construction, and operation of the project.

26. An activities and restoration plan shall be developed, in consultation with the U. S. Bureau of Land Management, to ensure that construction work is accomplished with minimum damage and that appropriate rehabilitation is performed.

27. An acceptable land fill location shall be determined in cooperation with the U. S. Bureau of Land

Management and El Dorado County for disposal of dredged or excavated spoil material.

28. Facilities shall be colored where applicable to blend the facilities into the natural setting. This shall be coordinated with the U. S. Bureau of Land Management.

29. For purposes of recreational mitigation, permittee shall:

(a) provide for picnicking around the powerhouse area with two picnic tables with designated fire rings. Season of use shall be designated on a posted warning to prevent use during critically dry periods.

(b) provide parking for eight vehicles on the access road before any gate structure.

(c) not restrict foot traffic below the proposed diversion structure.

This term shall not be construed to prevent implementation of security measures to protect the project facilities.

30. A qualified archeologist shall be present during excavations at the tunnel exit, trifurcation section, new penstock location (if a new penstock is proposed) and outside the limits of the existing powerhouse location and tailrace. If any previously unrecorded archeological or historical sites are discovered during the course of construction or development of any project works or other facilities at the project, construction activity in the vicinity shall be halted, a qualified archeologist shall be consulted to determine the significance of the sites, and the Permittee shall consult with the State Historic Preservation Office (SHPO) to develop a mitigation plan for the

protection of significant archeological or historical resources.

31. Permittee shall install a fish screen of a type and in the location that is acceptable to the Department of Fish and Game.

Dated: Feb 16 1984

/s/ Carole A. Onorato
CAROLE A. ONORATO, Chairman

/s/ Warren D. Noteware
WARREN D. NOTEWARE,
Vice Chairman

/s/ Kenneth W. Willis
KENNETH W. WILLIS, Member

/s/ F. K. Aljibury
F. K. ALJIBURY, Member

7. STAFF ANALYSIS (SWRCB)

[Attached as Exhibit C to Cal. Request for Rehearing, included in FERC certified list, at pages 599-703 (Ninth Circuit docket entry 2/3/88).]

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

ROCK CREEK HYDROELECTRIC PROJECT
STAFF ANALYSIS OF RECORD

PERMITTED APPLICATIONS 26380 AND 27353 OF ROCK CREEK LIMITED PARTNERSHIP; ROCK CREEK TRIBUTARY TO SOUTH FORK AMERICAN RIVER

EL DORADO COUNTY

JANUARY 1987

* * *

3.0 PROJECT HISTORY [p. 2]

Applications 26380 and 27353 were filed March 22, 1980 and June 4, 1982, respectively, by Joseph M. Keating. Protests were received and, subsequent to a Board hearing, permits were issued on the applications June 12, 1984. Due to a change in ownership of the project, the permits were assigned to Rock Creek Limited Partnership December 20, 1985. Following is information from the project files on permitted applications 26380 and 27353.

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8. WATER RIGHTS ORDER 87-2 (SWRCB)

[Attached as Exhibit A to Cal. Motion to Intervene, included in FERC certified list, at pages 530-598 (Ninth Circuit docket entry 2/3/88).]

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Permits 19259 and 19260, Issued on Applications 26380 and 27353, ROCK CREEK LIMITED PARTNERSHIP, Permittee,	ORDER: WR 87-2 SOURCE: Rock Creek COUNTY: El Dorado

ORDER AMENDING WATER RIGHT
PERMITS 19259 AND 19260

BY THE BOARD:

1.0 INTRODUCTION

Permits 19259 and 19260 having been granted on Applications 26380 and 27353 subject to terms and conditions; the Department of Fish and Game (hereinafter referred to as "Department") having requested that the State Water Resources Control Board (hereinafter referred to as "Board") amend Permits 19259 and 19260 to require a greater bypass of streamflow for the fishery; a public hearing having been held before the Board on May 19, 1986 and on September 15, 1986; permittee and the Department having appeared and presented evidence; the Board having considered all evidence in the record, the Board finds as follows:

2.0 BACKGROUND

2.1 On February 16, 1984, the Board in Water Right Decision 1596 ordered that Permits 19259 and 19260 be issued to Joseph Martin Keating subject to certain terms and conditions. Mr. Keating subsequently sold the project to Rock Creek Limited Partnership, which became the water right permittee. Conditions 9 and 10 of Decision 1596, which became terms 16 and 17 of Permits 19259 and 19260, are the subject of the current proceeding.

2.2 Permit term 16 provides:

"For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

"a. From October 1 through April 30, a minimum of 15 cubic feet per second;

"b. From May 1 through September 30, a minimum of 11 cubic feet per second;

"The total streamflow shall be bypassed whenever it is less than the amount designated for that period."

"No water shall be diverted under this permit until permitte has installed a device, satisfactory to the State Water Resources Control Board, which is capable of measuring these bypass flows."

2.3 Permit term 17 provides:

"a. Permittee, in consultation and cooperation with the Department of Fish and Game, shall conduct an Instream Flow Incremental Methodology IFG-4 flow study within the reach of Rock Creek from 500 feet

upstream of the diversion dam downstream to the point of return of water from the proposed powerhouse at the confluence of Rock Creek with South Fork American River. The study shall evaluate the effects of flow levels on trout life history stages and on habitat needed to support the different life stages.

The study shall model all representative habitats of the affected reach of Rock Creek including the habitats not previously modeled by the permittee's contractor. (These include the spawning habitat, the low gradient riffle habitat in the upper part of the affected reach, and the side channel of the stream segment previously modeled by the permittee's contractor.) To the extent possible, and with the agreement of the Department of Fish and Game, the permittee may use the original IFG-4 study to supplement the new study.

"b. All field work elements of the study described in a. shall be completed prior to commencement of any construction work in the channel and overflow areas of Rock Creek within the reach described in a. No diversion of water shall be made from Rock Creek until the study described in a. is completed and the results evaluated.

"c. The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after evaluating the results of the study described in a. and after notice to interested parties and opportunity for hearing."

2.4 The key issues for hearing were listed as:

"1. Has the permittee performed the fisheries habitat study as required by terms 17a and 17b?

"2. Should the bypass flows required in term 16 be revised and, if so, what flows should be required?

"3. Should term 20 be amended to allow static tests to determine the seepage loss of the tunnel?"

The third issue, regarding term 20, was resolved before the hearing and term 20 of each of the two permits was amended in accordance with the permittee's request. The first and second issues, therefore, were the subject of the hearing.

2.5 Permits 19259 and 19260 authorize direct diversion not to exceed 100 cubic feet per second (cfs) all year and not to exceed 140 cfs from October 1 through May 31, respectively, for the purpose of generating hydroelectric energy.

2.6 The Department, after reviewing and evaluating the fishery studies performed by the permittee, requests that the permittee by required to bypass flows of the lesser of 30 cfs or natural flow from October 1 through February 29 and the lesser of 60 cfs or natural flow from March 1 through September 30. Permittee opposes the Department's recommendation and recommends that the permits continue to require the bypass of 15 cfs from October 1 through April 30 and 11 cfs from May 1 through September

30. To support its position, permittee has raised several procedural and jurisdictional issues which we will consider before discussing the merits of the bypass flow requirements recommended by the two parties.

3.0 JURISDICTIONAL ASSERTIONS

Permittee asserts three jurisdictional claims which may be summarized as follows:

1. With respect to hydroelectric power licensees of the Federal Energy Regulatory Commission ("FERC"), California law governing appropriation of water is preempted by federal law;

2. Permittee's project may be operated in exercise of riparian rights recognized under California law; and

3. Permittee's project may be operated in exercise of a combination of such riparian rights and federal reserved rights.

The relevance of these claims to the present stage of this proceeding is highly questionable. If any one of these claims is wholly correct, then permittee would not be required to obtain a permit from this Board to appropriate unappropriated water. Permittee has, however, made application for such permit and a permit has in fact been issued. The proceeding at this stage is concerned with the issue of what streamflow bypass conditions should be required of permittee to protect the fishery; the Board has expressly reserved jurisdiction to address this issue

and amend the permits in accordance with its findings. We do not perceive what permittee's jurisdictional claims have to do with the issue of the streamflow bypass flows that should be required in the permits; these claims go to the question of *whether* permittee is bound to obtain a conditional appropriative water right permit at all, not to the question of *what conditions* should, in the public interest, be imposed in the permits. In other words, permittee cannot reasonably urge absence of permit jurisdiction as grounds for retaining the existing provisional streamflow bypass permit conditions.

However, notwithstanding that permittee's jurisdictional assertions have no apparent relevance to the issue whether the bypass flows should be revised, we briefly discuss permittee's claims below, to explain why the Board has jurisdiction is this matter and therefore has not dismissed the proceeding herein.

3.1 *Federal Preemption of Control Over Appropriation of Water*

Permittee argues that the Board has no power to issue permits for hydroelectric power plants licensed by the Federal Energy Regulatory Commission (hereinafter referred to as "FERC"). The FERC is a successor of the Federal Power Commission (hereinafter referred to as "FPC"). In support of its contention that the FERC has jurisdiction to license the Rock Creek Project and that federal jurisdiction over the Rock Creek project is exclusive, permittee

cites several cases decided in the United States Supreme Court and in other federal courts.

We agree with permittee that the FERC has jurisdiction to license the Rock Creek Project. However, we disagree with permittee's contention that FERC's jurisdiction is exclusive with regard to the control of the diversion and use of water for hydroelectric power generation.

First, the language of the Federal Power Act is explicit in requiring that an applicant for a license from the FERC comply with state law requirements with respect to the beds and banks of streams and the appropriation, diversion, and use of water for power purposes. 16 U.S.C. § 802(b) (Section 9(b) of the Act). Further, the Federal Power Act provides that nothing contained in the Act affects or is intended to affect or interfere with state laws relating to the control appropriation, use or distribution of water. 16 U.S.C. §821 (Section 27 of the Act). Together, these sections make it clear that applicants for hydropower licenses from the FERC must obtain state water right permits if state law so requires, and that the Federal Power Act does not preempt the operation of state water right laws.

None of the cases cited by permittee to oppose the Board's jurisdiction involved a challenge to a state's authority to regulate the appropriation of water by a licensee of the FERC. Rather, the cases address the authority of the FERC to issue a license. As we have stated above, we do not question the FERC's authority to license a hydropower project in California.

Throughout the history of the United States, Congress has consistently deferred to state water right laws. *California v. United States* (1978) 438 U.S. 645, 653, 98 S.Ct. 2985, 2990. Recognizing this deference and the clear language of Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), the United States Supreme Court in *California v. United States, supra,* held that the United States must obtain its water rights for the New Melones Reservoir on the Stanislaus River from the State of California, and must comply with the state-imposed terms and conditions on the appropriation of water. This decision disapproved dicta which had been assumed to be law regarding Section 8 in a series of cases. Prior to the decision in *California v. United States,* the United States had asserted that it could appropriate water for its reclamation project without complying with state law.

The language of Section 27 of the Federal Power Act is nearly identical to the relevant part of Section 8 of the Reclamation Act. Section 27 states:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821)

Similarly, Section 8 of the Reclamation Act of 1902 states in relevant part:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." (42 U.S.C. § 383).[1]

Based on the Congressional Record, it is apparent that Section 27 of the Federal Power Act, adopted in 1920, is patterned after Section 8 of the Reclamation Act and is intended to require that developers of hydropower projects obtain their water rights under state law. Remarks of Senator Nelson, 59 Cong. Rec. 1040 (1920); 56 Cong. Rec. 9110-9115 (1918) (debate on an earlier version of the bill that became the Federal Power Act). The cases containing dicta (disapproved in *California v. United States*) which suggested a contrary result under the Reclamation Act were not decided until many years later, and cannot be used to imply an intent by Congress in 1920 to override state water laws. Rather, the prevailing view at the times when both acts were passed was that Congress already had passed laws sufficient to ensure that the states would always have control over water rights within their boundaries. *United States v. Rio Grande Dam & Irrig. Co.* (1899) 174 U.S. 690, 19 S.Ct. 770, *California Oregon Power Co. v. Beaver*

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[1] Another part of Section 8 is codified separately at 43 U.S.C. § 372.

Portland Cement Co. (1935) 295 U.S. 142, 55 S.Ct. 725, *California v. United States, supra.*

The leading case in the series of cases cited by permittee in support of its argument is *First Iowa Hydro-Electric Cooperative* v. *FPC* (1946) 328 U.S. 152, 66 S.Ct. 906. An examination of the *First Iowa* decision shows that the Iowa law under consideration was not a water right law. Rather, it involved the regulation of dams. Because no state water right law was involved, the court based its holding only on Section 9(b) and not Section 27 of the Federal Power Act, which specifically provides that the Federal Power Act does not affect or interfere with state laws regarding the control, appropriation, use or distribution of water.

However, the *First Iowa* court in dicta discussed Section 27 of the Federal Power Act. In its discussion, the court observed that Section 27 saves state laws regarding water rights from supercession by the Federal Power Act.

Based on the above considerations, we conclude that we have jurisdiction in this matter to regulate the Rock Creek Project, notwithstanding the concurrent exercise of jurisdiction over other aspects of the project by the FERC. Any differences from the FERC license should be handled by complying with the stricter terms and conditions.

3.2 *Permittee's Claim of Riparian Rights*

Permittee argues that it does not need a water right permit because it has riparian water rights. Therefore, permittee apparently contends that the Board should not exercise jurisdiction over the Rock Creek Project.

Permittee alleges that part of the Rock Creek Project is located on federal Bureau of Land Management ("BLM") land contiguous to Rock Creek and that the remainder of the project is located on land contiguous to Rock Creek that is owned in fee by permittee. Permittee further alleges that it has permission in its FERC license to use the BLM land including whatever riparian rights attach to it,[2] and that the downstream part of the BLM land has been privately owned. Permittee admits that the upstream part of the BLM land contiguous to Rock Creek never has been privately owned.

Assuming that all of the above factual allegations are true and that permittee's interpretation of the

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[2] We are unable to find any provision in the FERC's Order Issuing License for this project (No. 3189-003), issued April 29, 1983, which purports to authorize the permittee to use whatever riparian rights may be held by the Bureau of Land Management in the project area. The only provision therein referring to riparian rights is Order paragraph (B)iii, which defines certain properties and rights which are necessary to the operation or maintenance of the project as part of the project. Order paragraph (B)iii in no way can be read as a grant. Rather, it is a definition. If anything, its implication is that water rights are a necessary part of the project, to be acquired by the permittee.

FERC license is correct, it is our opinion that the permittee lacks sufficient riparian rights to operate the project. Therefore, permittee requires a permit to appropriate water.

First, the power generation entitlement of a riparian landowner is to the hydraulic effect of the natural flow of the stream measured by its drop from the highest point to the lowest point on his land. *Seneca Consolidated Gold Mine v. Great Western Power* (1930) 209 Cal. 206, 219, 287 Pac. 93. When water is used to generate power, the use made of the water is to develop and capture the force inherent in the fall of the water from one level to another. The force that results from the fall of water is dependent on the distance of the fall. Thus, a greater use can be made of water that falls a greater distance. However, a water right holder acquires only the right to the *use* of water. Water Code § 102. Therefore, if *Seneca, supra,* is correct as to the measure of a riparian landowner's right to use water to generate hydroelectric power, the Rock Creek Project has a riparian entitlement only to the drop of water from the highest point on the stream where the project has a possessory interest in the adjacent riparian land, to the lowest point where it possesses adjacent riparian land, but does not include the drop attributable to any intervening segment of the stream in which the project lacks a possessory interest or to which riparian rights are not attached. Therefore, if permittee's factual allegations are correct, permittee has a riparian right to use the hydraulic energy attributable to the fall of water in the creek on its own land

and, if the FERC license were correctly interpreted as allowing permittee to use any riparian rights attached to the BLM land, then permittee also would have a riparian right to use energy attributable to the part of the creek that flows through the BLM land that once was held in private ownership.[3] Even if riparian rights attach to the upstream portion of the BLM land, which has not been held in private ownership, we believe permittee must have appropriative rights to use the hydraulic energy attributable to this portion of the creek.

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[3] Based primarily on the holdings in *McKinley Bros. v. McCauley* (1932) 215 Cal. 229, 9 P.2d 298 and *Rindge v. Crags Land Co.* (1922) 56 Cal.App. 247, 205 Pac. 36, we have previously taken the position that riparian rights do not attach to land until it is patented to private ownership. In *McKinley* and in *Rindge*, appropriative rights which were initiated prior to the patenting of certain riparian properties to private ownership were given priority over the riparian rights appurtenant to subsequently patented lands upstream. The basis for these holdings was that "riparian rights do not attach to land held by the government until such land has been transmitted to private ownership." *McKinley, supra.* 9 P.2d 299.

The question of whether the United States has riparian rights on lands which have never been held in private ownership was the subject of a recent opinion by the Court of Appeal, Third Appellate District. (*In the Matter of the Determination of the Rights of the Various Claimants to the Waters of Hallett Creek Stream System in Lassen County, California,* No. 3 CIV 24355). Our position in the Court of Appeal was that the United States Forest Service does not have riparian rights on its lands which never have been held in private ownership. The Court of Appeal disagreed with our position, and held that the United States has riparian rights which lack priority over any other user of water, whether the other user is using water now or will use it in the future. We are seeking review of this opinion.

Permittee argues that, even if it does not have a right to use the United States' water rights or even if the United States lacks riparian rights, permittee can go upstream from its riparian property to divert water for its hydroelectric project. Permittee bases its argument on several cases which allow a riparian landowner to go upstream to divert its water supply. The cited cases are distinguishable, however. Most of them are cases in which the water was to be put to consumptive use on riparian property. To the extent that a riparian right holder diverts water upstream of his property solely for convenience and does not put it to use by capturing the hydraulic energy in the water attributable to the upstream lands, we believe that the cited cases apply. However, wherever the riparian diverter for power purposes puts the water to use by capturing its hydraulic energy, it must have a water right appurtenant to the land on the part of the stream to which the energy is attributable. We reach this conclusion because when water is used in generating power, it is used for the purpose of developing a force which can be converted to electricity. Such a force is developed because of the topography of land adjacent to the stream, and the incremental addition of any part of the stream above the riparian property will add an incremental amount of force attributable to the upstream nonriparian property. The use of the fall of water attributable to the upstream property is subject to appropriation under Water Code § 1201.

3.3 *Permittee's Claim of Federal Reserved Water Rights*

Permittee argues that it does not need a water right permit because it has federally reserved water rights to use the water flowing in Rock Creek. Permittee apparently makes this argument as a further basis for contending that the Board should not exercise jurisdiction over the Rock Creek Project.

Permittee correctly points out that Section 24 of the Federal Power Act, at 16 U.S.C. § 818, includes the following language:

> "Any lands of the United States included in any proposed project under the provisions of this subchapter shall from the date of filing of application therefor be reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the Commission or by congress. Notice that such application has been made, together with the date of filing thereof and a description of the lands of the United States affected thereby, shall be filed in the local land office for the district in which such lands are located."

Permittee interprets Section 24 as according permittee a federal reserved water right. However, no court in a reported case has ever held that Section 24 operates in combination with the reserved water rights doctrine to accord reserved water rights to a hydroelectric project. To the extent that reserved water rights have been implied to exist in connection with a hydroelectric project, the reservations of federal land were made under laws other than the Federal Power Act. *See*, e.g., *Federal Power Commission v. Oregon* (1955) 349 U.S. 435, 75 S.Ct. 832. Thus,

no holding exists that Section 24 can itself operate to reserve water.

Section 24 of the Federal Power Act must be read in context with other provision of the Act. Particularly, it must in this case be read with Sections 9(b) and 27 of the Act.

Section 9(b) provides:

> "Each applicant for a license under this chapter shall submit to the commission –
>
> * * *
>
> "(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter." (16 U.S.C. § 802.)

More importantly, Section 27 provides:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein." (16 U.S.C. § 821.)

Together, Section 9(b) and 27 clearly provide that a hydropower proponent must acquire water rights under the laws of the state, and that *nothing* in the

Federal Power Act is to be construed as interfering with state water right laws. Thus, the plain meaning of these sections is that Section 24 does not accord water rights to a hydropower licensee of the FERC. Since all three of these sections were enacted together in the original act, there can be no argument that Section 24 overrides the other sections.

As we found above in finding 3.1, Section 27 of the Federal Power Act is patterned on Section 8 of the Reclamation Act of 1902. Regarding the Reclamation Act section, the U.S. Supreme Court held that the United States must comply with state water right laws in obtaining water for its reclamation projects. *California v. United States* (1978) 438 U.S. 645, 98 S.Ct. 2985. Thus, if Section 27 is to be interpreted in the same way as Section 8 of the Reclamation Act, which it copies, it must be construed as requiring compliance with state water right laws, including Permits 19259 and 19260.

Based on the foregoing discussion, we conclude that permittee does not have federally reserved water rights that would eliminate the requirement that permittee obtain and comply with appropriative water rights under the California Water Code.

4.0 QUESTIONS OF PROOF

4.1 *Burden of Proof*

Permittee argues that the Department of Fish and Game, since it requested that the bypass flow requirements in Permits 19259 and 19260 be

amended, has the burden of proving that the bypass flows should be amended.

For the reasons stated below, we conclude that permittee and the Department each have the burden of proving the facts to support their own proposals for a minimum bypass flow. Each party must meet its burden by a preponderance of the evidence.

This case comes to the Board for decision on a condition in permittee's permits reserving jurisdiction. The reservation of jurisdiction was imposed by the Board in Decision 1596 when it approved issuance of the permits. As provided in Water Code § 1381, "The issuance of a permit gives the right to take and use water only to be extent and for the purpose allowed in the permit."

The reservation of jurisdiction, in Term 17(c), is to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels after evaluating the results of a study the permittee was required to conduct pursuant to Term 17(a). The bypass flow requirements in Term 16 are for 15 cubic feet per second from October 1 through April 30 and 11 cubic feet per second from May 1 through September 30.

The reasons for the reservation of jurisdiction and for setting the current bypass flow requirements are set forth in Decision 1596 at finding 7, pages 8 and 9. To summarize, the Board found that the instream flow study presented to the Board by the permittee's predecessor at the 1983 hearing was deficient in several important respects, and that because of the

deficiencies no valid basis existed for the minimum flow requirements set forth in Permit Term 16. However, the protestant (the Department of Fish and Game) agreed that the project could be approved with the 11 cfs/15 cfs minimum flows pending further study, if the Board reserved jurisdiction to change the flow requirements after the further study. These flows were matched to the interim flow requirements in the license issued by the Federal Energy Regulatory Commission. *See* Decision 1596, pp. 8-9.

Because no valid basis was provided at the 1983 hearing for the current minimum flow requirements, permittee's predecessor failed to meet its obligation to provide information to the Board concerning the effects of the appropriation on fish, under Water Code § 1260(j), and failed to demonstrate how much water actually is available for its appropriation after fishery needs are satisfied. (*See* Water Code § 1243).

Rather than deny the applications or defer a decision on them until a fishery study was done, the Board decided to approve the application subject to terms and conditions including Terms 16 and 17, in which the Board required a further fishery study and reserved jurisdiction. By approving the project, the Board relieved the permittee of the delays that would be involved in either reapplying for permits or having to wait for its permit while it did the additional fishery study.

Since the Board was satisfied that sufficient water would be available for the project after the bypass of

some flows for fishery and riparian vegetation protection (*see* finding 6.a. of Decision 1596), the question of the level at which to set the bypass flows was not a matter that would require a delay in approving the basic project. Rather, it was a question that would affect the amount of flow the project would have to bypass. (We recognize that the amount of the bypass affects the amount of water that may be passed through the project's generators, and thereby affects the amount of energy the project will produce and the amount of money it will earn. However, permittee made the decision to proceed with construction of the project notwithstanding the uncertainty as to the final bypass flow.)

This proceeding is not, as permittee suggests, a disciplinary or revocation proceeding. Such proceedings are conducted under Water Code §§ 1410 et seq. and 1825 et seq. This proceeding is instead an exercise of reserved jurisdiction under Permit Term 17. Exercises of reserved jurisdiction to amend permit terms and conditions are appropriate in the administration of water rights. *See United States v. State Water Resources Control Board*, (1986) 182 Cal.App. 3d 82, 227 Cal.Rptr. 161.

By its nature, a proceeding on reserved jurisdiction is a continuation of the original proceeding, for the purpose of adjusting the terms and conditions of water rights in response to new information and changing circumstances. *See* Water Code §1394.

Further, this proceeding does not threaten *in fact* to revoke a part of permittee's water right. Under Term

16, permittee's authorization to divert and use water was from its inception, and remains, subject to the needs of the Rock Creek fishery. The permit clearly shows that uncertainty exists as to the exact needs of the fishery and that further action may be taken after a fishery study. The permittee has no rights under the permit to take and use water beyond the authorization contained therein, and the permittee takes the permit subject to its conditions. Water Code §§ 1381, 1391. Also, the fishery is protected by the public trust doctrine, against which no one has a vested right. (*See National Audubon Society v. Superior Court*, 33 Cal.3d 419, 658 P.2d 709 (1983); *People v. Truckee Lumber Co.* (1897) 116 Cal. 397, 48 Pac. 374; and Decision 1596, page 8.) Thus, no threat exists that the permittee may lose something to which it has a right.

Permittee is generally correct that the moving party has the burden of proof in administrative proceedings. However, this rule varies when public policy considerations favor protecting a particular interest. *CEEED v. Calif. Coastal Zone Conservation Comm'n* (1974) 43 Cal.App.3d 306, 118 Cal.Rptr. 315, *State v. City and County of San Francisco* (1979) 94 Cal.App.3d 522, 156 Cal.Rptr. 542. In this case, public policy, including the public trust doctrine, favors the protection of fisheries in connection with the appropriation of water. Water Code §§ 386, 1243, 1260(j); *National Audubon* and *Truckee Lumber, supra*. To place the burden of proof that the current bypass flow requirement is inadequate on the party who seeks to provide the greater protection for the fishery would

favor the limitation or destruction of the fishery. Therefore, public policy considerations favor putting the burden on the permittee to prove that the 11 cfs/15 cfs bypass flow requirement is adequate to protect the fishery at the natural preproject level.

Further, since the bypass flow requirements were not finally determined and were established provisionally in Decision 1596, the affirmative case in the instant proceeding remains with the permittee to prove the correct bypass flow. Having failed initially to satisfy all of the requirements of an application, the permittee still has the burden of proving its assertions regarding the fishery's needs which it did not prove before. The Board in Decision 1596 determined that the appropriate bypass flow for Rock Creek would be the bypass flow that would protect the fishery in Rock Creek at the preproject level. (See Decision 1596, page 8, finding 7.b.) Consequently, permittee must prove that the fishery will be protected at preproject levels under the 11 cfs/15 cfs flow regime.

Finally, we note that the Evidence Code at § 500 provides that:

> "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."

Since establishing the 11 cfs/15 cfs bypass flow requirement as the appropriate flow is essential to

permittee's case, permittee has the burden of proving that this is the appropriate requirement. Likewise, the Department of Fish and Game has the burden of proving that the 30 cfs/60 cfs bypass flows it recommends are appropriate.

4.2 *Standard of Proof*

Permittee asserts that the standard of proof in this case should be that of clear and convincing proof to a reasonable certainty. This argument is founded on the theory that permittee has a vested property right to the use of water in Rock Creek. Permittee cites in support of the theory that it has a vested right a general dictum in *United States v. State Water Resources Control Board, supra,* at 182 Cal.App.3d 101. However, the dictum states only the general rule and does not explain when rights are acquired to use water. Nor does it explain the limitations on either the extent of a water right or the extent of vestedness.

A permit to divert and use water is merely permission to commence the acquisition of an appropriative water right. As the California Supreme Court explained in *Temescal Water Co. v. Department of Public Works*:

> "A permit itself confers no appropriative rights but fixes the priority of its recipient over subsequent appropriators, Water Code §§ 1450-1456; it expressly provides that its issuance is subject to vested rights." *Temescal Water Co. v. Department of Public Works* (1955) 44 Cal.3d 90, 280 P.2d 1.

Subsequently, in *Eaton v. State Water Rights Board* (1959) 171 Cal.App.2d 409, 340 P.2d 722, the Court of Appeal made this same point and elaborated on it as follows:

> "The final procedural step in perfecting a water right is the issuance of a license as prescribed in sections 1600 through 1677 of the Water Code. The issuance of a license is merely confirmatory of a right *acquired by use* in accordance with the permit.
>
> "On the issuance of a permit the permittee has the right to take and use the water to the extent allowed in the permit." (Emphasis added.)

Also see *Madera Irr. Dist. v. All Persons* (1957) 306 P.2d 886, 892, 47 Cal.2d 681; Hutchins, *The California Law of Water Rights* (1956), pp. 108-112; Water Code §§ 1455, 1600-1651.

Thus, an appropriative water right is acquired by taking water under control and putting it to beneficial use in accordance with a permit to appropriate the water and in accordance with the Water Code, Division 2, Part 2. After the water has been put to beneficial use, the Board issues a water right license which confirms the right to appropriate the amount of water which has been applied to beneficial use within the terms and conditions of the permit. Water Code § 1610. It is the responsibility of the appropriator to show that the claimed amount of water has been appropriated. Water Code § 1610.5.

In this case, no license has been issued confirming an appropriation of water pursuant to Permits 19259 and 19260. Further, there is no evidence in the record

that permittee has, since it acquired its permits, perfected a right to appropriate water up to the limits of its permits or for an amount less than that allowed in its permits. Since a permit legally is not evidence of a vested right to appropriate water, and nothing else in the record evidences the existence of a vested right, we conclude that permittee does not have a vested right. In fact, permittee appears to have just the bare permission to start acquiring a right. Under Water Code § 1455, the effect of issuance of a permit is limited: it continues the permittee's priority as of the date of the application and allows the permittee to take and use a specified amount of water for the life of the permit.

Even if, for sake of argument, permittee had a vested right in the sense of having perfected a water right, permittee nevertheless would have no vested right to take and use water needed to protect public trust values. *National Audubon, supra,* at 189 Cal.Rptr. 363-366; *United States v. State Water Resources Control Board, supra,* at 182 Cal.App.3d 106. Since, as we have noted above and in Decision 1596, the fishery is protected by the public trust, there can be no vesting of a right to harm it.

Generally, the proper standard of proof in cases where no fundamental vested right is involved is the preponderance of the evidence standard. *Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 185 Cal.Rptr. 601. Also, it appears that few matters qualify as fundamental vested rights. Professional licenses of physicians, lawyers and dentists have been held to be fundamental

vested rights. However, continued employment and worker's compensation have not been held to have this stature, and have been subject to the preponderance standard and substantial evidence review. *Ettinger*, id. We conclude that changes in water right permits likewise are subject to the preponderance standard and substantial evidence review. *See Bank of America v. State Water Resources Control Board* (1974) 42 Cal.App.2d 202, 116 Cal.Rptr. 770.

5.0 HYDROLOGY OF ROCK CREEK

Three different estimates have been made a part of the hearing record to depict the hydrology of Rock Creek's watershed, for the Rock Creek Project. The three hydrologies estimates are (1) the September 1981 estimated hydrology by Sierra Hydrotech; (2) the October 1985 synthetic flow record by Ott Water Engineers, and (3) the April 1986 synthetic flow record by Ott Water Engineers.

Probably the most accurate way to predict the hydrology of a watershed is to use a continuous long-term record of flows within the watershed to develop statistical probabilities of future flow occurrences at the same location. However, no continuous long-term record of flows exists for Rock Creek. Therefore, the permittee and its predecessor have commissioned studies based on other methods.

5.1 *September 1981 Hydrology*

In the first study, Sierra Hydrotech used isohyetal maps to determine average annual precipitation, estimated a ration of runoff to precipitation and then computed average annual runoff. Sierra Hydrotech then developed estimates of average monthly runoff by first computing the percentage of average annual runoff that occurs each month on similar streams and then applying these percentages to Rock Creek. While this provides an estimate of *average* monthly runoff, "average" runoff seldom actually occurs as rainfall varies dramatically in this area. To develop flow-duration data for Rock Creek, Sierra Hydrotech compared the shape of flow-duration curves from other streams and then used one observed flow on Rock Creek, the accuracy of which is unknown, to extrapolate a curve for Rock Creek. We cannot determine from the evidence that this data is accurate or typical of Rock Creek. Therefore, we find that the only useful portions of this hydrology are the average annual and monthly runoff figures.

5.2 *Hydrologies Based on Synthesized Data*

The second and third hydrologies by Ott Water Engineers both were made by comparing measured flows on Rock Creek with long-term gage-recorded flows on other streams, to develop correlation factors. The correlation factors were then used to synthesize a long-term record for Rock Creek. This method is considered adequate if the two stream basins are

similar, and if their characteristics do not differ significantly.

The October 1985 synthetic hydrology used data from Oregon Creek and the April 1986 synthetic hydrology used data from Forest Creek. Table 1 compares the major characteristics of each of these watersheds with the Rock Creek watershed. Table 2 summarizes the effects of these characteristics on hydrology. The tables show that the differences between the watersheds are significant. Therefore, it is questionable whether the resulting synthetic hydrologies are representative of what will occur on Rock Creek.

5.2.1 *April 1986 Hydrology*

For the April 1986 hydrology, permittee did not present its methodology for calculating the synthetic flows from the raw data (i.e., the 14 measured flows from Rock Creek and the gaged streamflow records from Forest Creek). Consequently, we do not know the means by which the synthetic flows were developed. Additionally, we have been unable to reproduce the methodology to verify the accuracy of the synthetic flows based on the data.

TABLE 1

Comparison of Basin Characteristics

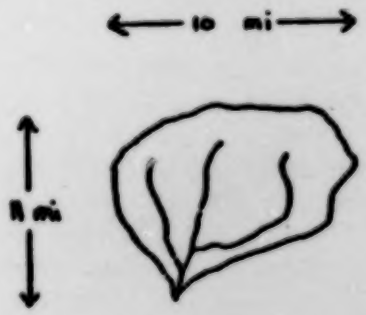
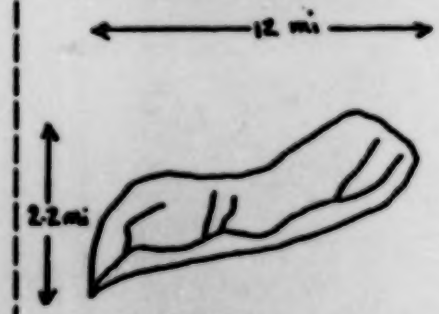
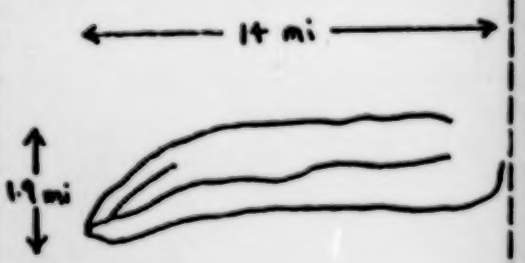
Element / Watershed	Rock Creek	Oregon Creek	Forest Creek
Area	68 sq. miles	23.0 sq. miles	20.8 sq.miles
width x length	10 mi. x 11 mi.	2.2 mi. x 12 mi.	1.9 mi. x 14 mi.
minimum elevation	1,300 ft.	2,230 ft.	2,950 ft.
maximum elevation	4,762 ft.	5,744 ft.	7,042 ft.
orientation	north to south	east to west	east to west
Dist. from Rock Creek	N/A	50 miles north	30 miles south
basin shape			

TABLE 2

(Effect of Watershed Characteristics on Hydrology)

CHARACTERISTIC	EFFECT		
	Rock Creek	Oregon Creek	Forest Creek
Basin Shape:	Large, heart-shaped basin with significant channel storage capacity. Storm induced runoff attenuated reducing maximum flows with low flows slightly higher and of longer duration.	Long, narrow basin with little channel storage. Runoff concentrated quickly to produce high peak flows that drop off quickly after storm passes.	Long, narrow basin with little channel storage. Runoff concentrated quickly to produce high peak flows that drop off quickly after storm passes.
Elevation:	Predominately below the snow-line. Little impact from snowmelt. Flows tend to decrease rapidly as soon as the storm season ends.	Fairly high elevation for lattitude. Significant amounts of snowmelt extend flows after winter storm season ends.	Fairly high elevation for lattitude. Significant amounts of snowmelt extend flows after winter storm season ends.
Orientation:	North-South orientation. Winter storms move from the northwest to the southeast and would tend to stay over the basin longer producing more effective precipitation and runoff.	East-west orientation. Winter storms move from the northwest to the southeast and can pass quickly over the basin if not stalled; producing less effective precipitation and runoff.	East-west orientation. Winter storms move from the northwest to the southeast and can pass quickly over the basin if not stalled producing less effective precipitation and runoff.
Geographic Location:	Located near the southern limit of the northern Sierra. Not all winter storms pass over this basin.	50 miles north of Rock Creek. This basin is located in the heart of the northern Sierra and most winter storms pass directly over the basin.	30 miles south of Rock Creek. This basin is located in the central Sierra and many storms either miss it or produce little effective precipitation.

Permittee has compared the April 1986 synthesized flows with 14 actual flow measurements from Rock Creek. The actual and synthetic flows show an extremely high degree of correlation. The correlation is unexpectedly high. Therefore, staff has attempted to verify the synthetic flows using the data supplied by the parties. However, the Board's staff was able to calculate the monthly correlation factors that permittee must have used to synthesize a flow record. Applying the factor for December, staff calculated a maximum flow of 7,257 cfs for Rock Creek. However, the April 1986 synthesized hydrology shows a maximum flow in Rock Creek of 999.9 cfs. Therefore, at least one unresolved inconsistency exists in the synthesized hydrology, and the accuracy of the hydrology cannot be verified. Permittee, therefore, has failed to demonstrate that the Forest Creek synthetic hydrology is representative of Rock Creek.

5.2.2 *October 1985 Hydrology*

Permittee did not provide much evidence regarding the synthetic hydrology based on Oregon Creek. Like the Forest Creek-based synthesis, no information was provided regarding the methodology for calculating the synthetic flows.

5.3 *Compiled Synthetic Hydrology*

All three hydrologies presented for Rock Creek have definite limitations. Because of the lack of

evidence to support them, we cannot with any confidence use any one of the synthetic hydrologies that have been presented to establish bypass flow requirements. However, all three of the hydrologies fall within a range. Notwithstanding that none of the hydrologies standing alone can reliably be considered to approximate Rock Creek's hydrology, the three when compiled provide a range within which substantial evidence shows that the actual hydrology exists. This range is depicted in Tables 3 and 4 and in Figures 1 and 2.

5.4 *Reserved Jurisdiction*

Since the compiled hydrology is based on several sets of data, it is possible that the permittee will want to develop a more exact hydrology for Rock Creek, for use in reevaluating the bypass flow requirements in the future. Therefore, we will continue the reservation of jurisdiction in Permits 19259 and 19260 to amend the bypass flow requirements set forth in the permits. If a change is requested in the bypass flow based on a new hydrology, we will require the party providing the new hydrology to also provide sufficient documentation so that we may verify the data.

6.0 ADEQUACY OF THE FISHERY STUDIES PERFORMED BY PERMITTEE

The first key issue listed in the Water Right Hearing Notice dated March 28, 1986 was, "Has the permittee performed the fisheries habitat study as required by terms 17a and 17b?"

TABLE 3

ROCK CREEK COMBINED HYDROLOGY
Average Monthly Flows (cfs)

Month	Low	High	Ave.
Oct	10.8	20	16.3
Nov	38	78	51.7
Dec	78	120.9	101.3
Jan	147.1	250	183.4
Feb	173	215	191.2
Mar	202.7	232	212.9
Apr	172.1	217	194
May	71	94	85.3
Jun	29.1	46	38.4
Jul	10.9	31	20.6
Aug	4.9	22	14
Sep	5.9	17	12.3
Ann. Ave.	82.7	109.7	92.8

TABLE 4

ROCK CREEK COMBINED HYDROLOGY
Annual Percent Exceedence Curves

Percent of time flow exceeded	Flow (cfs)		
	Low	High	Ave.
20	95	177	134
25	70	134	115
30	55	118	82.3
35	45	86	63
40	38	67	50.3
45	30	53	40.3
50	25	44	33.7
55	21	36	28
60	17	30	23.3
65	14	24	18.7
70	10	20	15.7
75	8	18	14
80	5	16	11.7
85	4	14	10
90	3	13	8.7
95	2	9	6
100	0	0	0

FIGURE 1

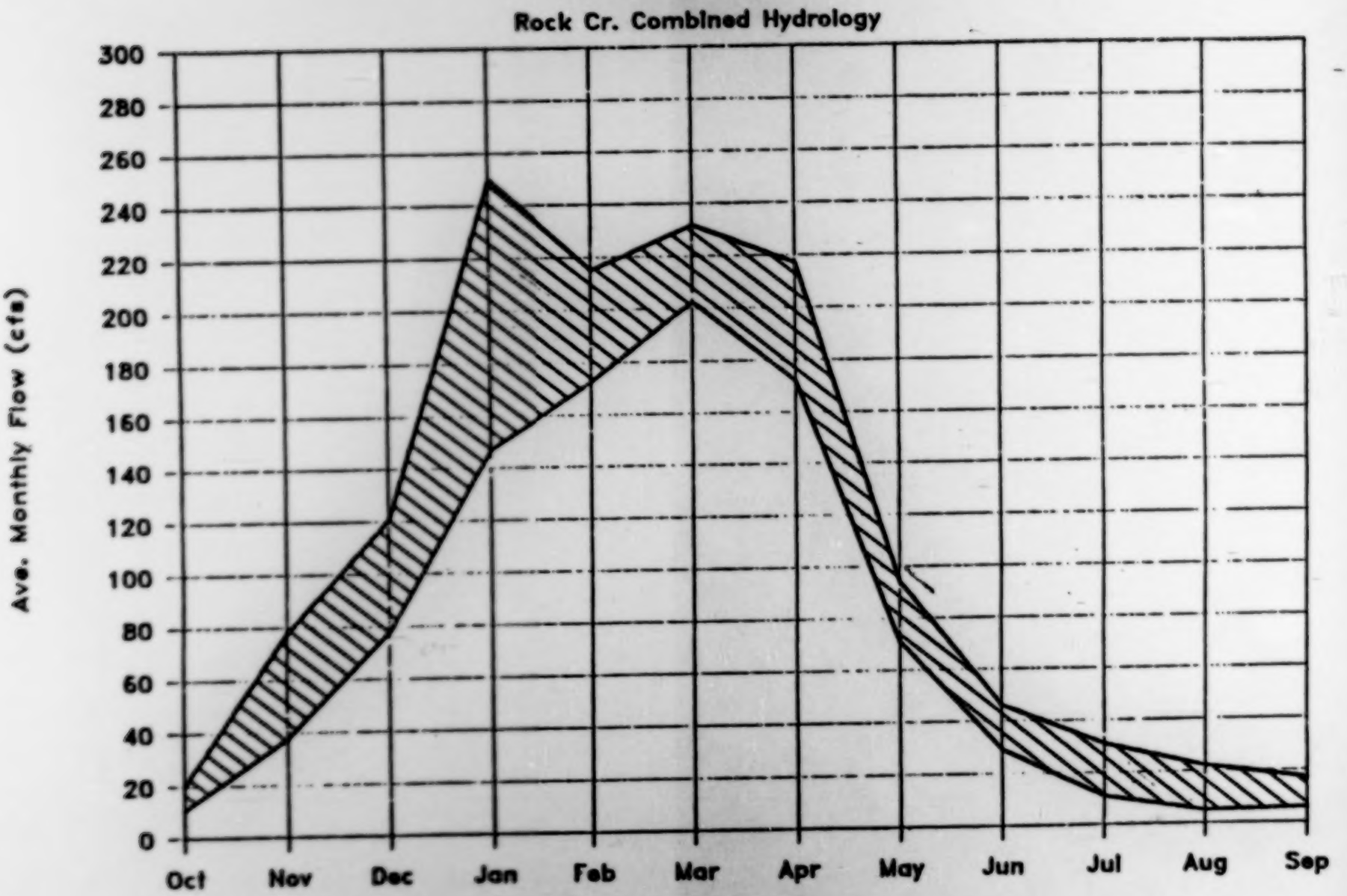
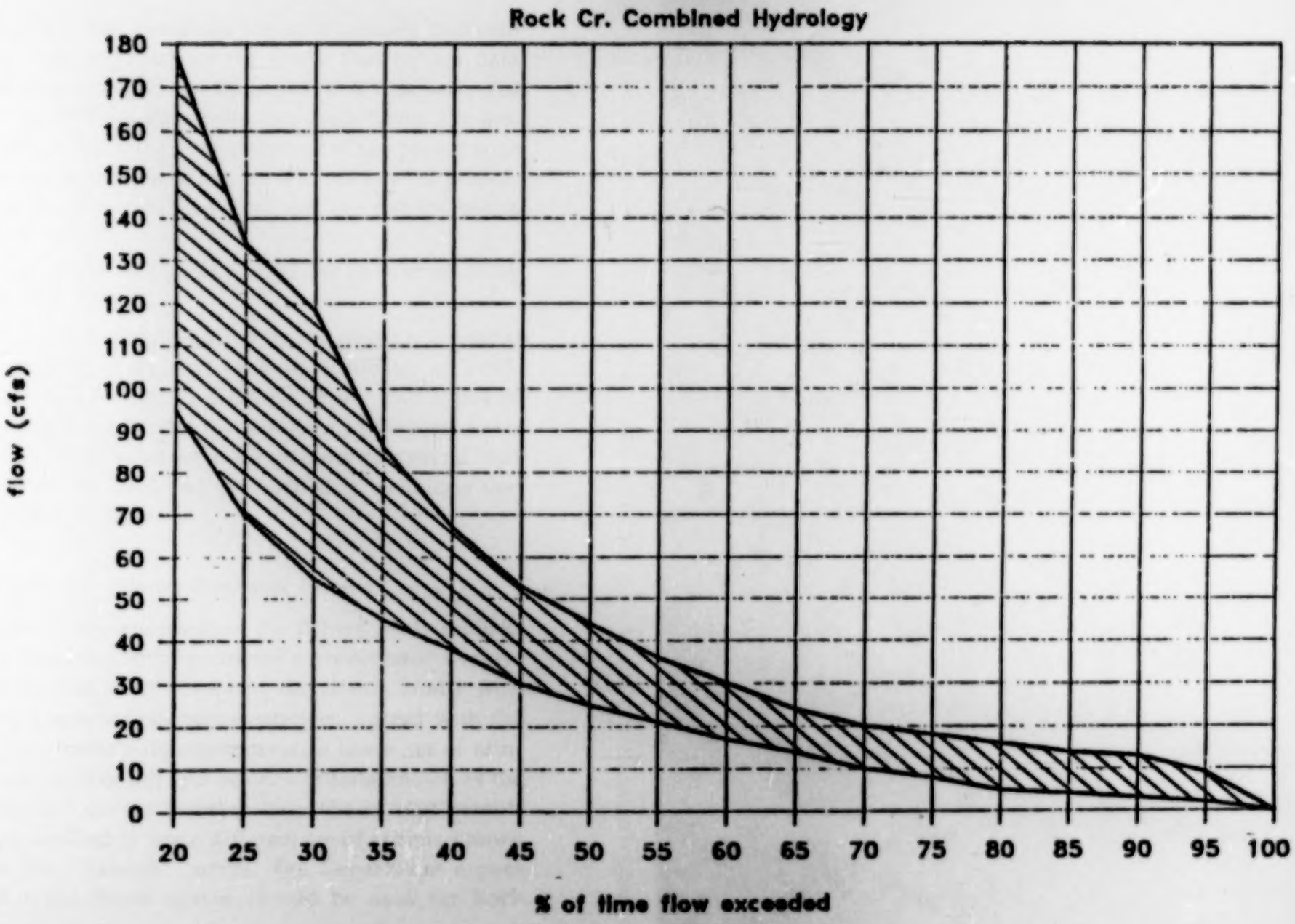

Rock Cr. Combined Hydrology
Ave. Monthly Flow (cfs)
300
280
260
240
220
200
180
160
140
120
100
80
60
40
20
0
Oct
Nov
Dec
Jan
Feb
Mar
Apr
May
Jun
Jul
Aug
Sep

FIGURE 2


Rock Cr. Combined Hydrology
flow (cfs)
180
170
160
150
140
130
120
110
100
90
80
70
60
50
40
30
20
10
0
20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
% of time flow exceeded

6.1 *Compliance With Data Collection Requirements*

We find that Permittee has substantially collected the data required for the study, that further data collection would not be useful, and that variances in permittee's data collection from terms 17a and 17b did not impair the purposes of the permit term requirement. Therefore, we will not require permittee to collect further data for the fishery study.

6.2 *Appropriate Analytical Method for Habitat Modeling in Rock Creek*

The IFG-4 study required by the Board is a habitat modeling study that provides estimates of available fish habitat at different flows. Two types of methods for habitat modeling are in dispute in this case – the rainbow trout preference criteria that should be used and the modeling technique that should be used.

6.2.1 *Depth and Velocity Preference Criteria*

Upon commencement of the fishery study ordered by Decision 1596, permittee's predecessor's representatives, after observing the stream jointly with the Department's representatives, agreed with the Department's representatives to use a set of rainbow trout depth and velocity criteria known as the "Bovee" curves. Subsequently, the current permittee decided to use a different set of criteria known as the "Raleigh" curves. The Department argues that the Bovee curves should be used for Rock

Creek. The primary difference between the two sets of criteria lies in the velocity curves for the two sets of criteria.

The Raleigh curves generally indicate that rainbow trout prefer lower water velocity than is indicated by the Bovee curves. The Bovee curves are more in agreement with habitat preference data from the Sierra than the Raleigh curves to predict the flow and depth conditions an adult rainbow trout will select. Much of the selection of one or the other of the two curves to analyze a particular stream is dependent on the observations and experience of fisheries biologists with the subject stream and with similar streams in the same geographical area. The fisheries witnesses for the Department have had more extensive and longer term experience with the Rock Creek rainbow trout fishery and the fisheries of other streams in that geographical area than have either of permittee's fishery biology witnesses. The Department's four fishery biology witnesses had at the time of the hearing approximately four years, four years, three years, and three years experience, respectively, with the stream when the hearing commenced. Permittee's witnesses each had had less than a year's experience with the stream, and one of them had less than three months' experience with it. For a fisheries biologist to observe a stream at all times of the year before making predictions about it is especially valuable. Not only have Department's witnesses had much more experience with Rock Creek

than the permittee's witnesses, but also the experience of the Department's witnesses in the area of the Sierra where Rock Creek is located is much more extensive than that of the permittee's witnesses. The Department's judgment in matters of protecting fish life is entitled to great weight in the Board's proceedings. *Bank of America, supra,* at 116 Cal.Rptr. 778-779.

The opinions of the Department's witnesses that the Bovee curves more closely fit the situation in Rock Creek is corborated by a fish habitat study on Deer Creek by Moyle and Baltz (permittee's exhibit 4, P-61), which is similar to Rock Creek in fish assemblage and temperature regime. Both of these characteristics are important to evaluation of flow and depth preferences. Deer Creek data more closely support the Bovee adult curve, support neither curve for juvenile fish, and more closely support the Raleigh fry curve.

Thus, neither proposed set of curves appears completely representative of Rock Creek for all life stages. The Bovee adult and juvenile curves are more applicable to Rock Creek, and it is uncertain which fry curves are more applicable.

6.2.2 *Modeling Technique*

Permittee used the IFG-4a modeling technique rather than the IFG-4 modeling technique specified in the permits at term 17a. The IFG-4a technique produces results comparable to the IFG-4 modeling

technique using the Rock Creek data. Therefore, we will accept the results of the IFG-4a modeling technique.

7.0 BYPASS FLOW REQUIREMENT

Permittee argues that the provisional bypass flow requirements set forth in the permits at term 16, 11 cfs from May through September and 15 cfs from October through April, are sufficient to protect the fishery resources of Rock Creek at natural preproject levels. The Department argues that bypass flows of 30 cfs from October through February and 60 cfs from March through September are needed to protect the fishery resources at natural preproject levels. The issues are, (1) whether a "pinch period" operates to reduce the rainbow trout population during the lowest natural flow period in the summer, so that reduction of flow and habitat during other times of year by the project to the "pinch period" level would not adversely affect the fish population more than the effect of the natural "pinch period"; (2) whether the Tennant method should be used to determine the flows needed to protect the fishery resources; (3) how observations of Rock Creek should be applied; (4) which fishery modeling analyses should be used.

7.1 *Fishery Habitat Modeling Analyses*

We have assumed for purpose of evaluating the modeling analyses that the "average" values listed

in Table 3 approximate the mean monthly flows in Rock Creek. Using these flows, the Board's staff has compared the results of the IFG-4a modeling, applying the Raleigh and the Bovee sets of criteria to the results.

7.1.1 *Effect of the Two Sets of Minimum Flows on the Adult Life Stages*

The adult life stage is important in Rock Creek because the adult stage is the object of angler harvest, and because it is necessary for adults to exist to spawn and perpetuate the population. Using either the Bovee or the Raleigh curves the minimum flows recommended by the Department preserve more fishery habitat for adults than the minimum flows recommended by permittee.

7.1.2 *Effect of the Two Sets of Minimum Flows on the Juvenile Life Stage*

Using either the Bovee or Raleigh curves, the minimum flows recommend [sic] by the Department provide more habitat for juveniles than the minimum flows recommended by the permittee. Under the Bovee curve, which is more applicable to Rock Creek, more habitat is protected by the Department's minimum flows, than by the minimum flows permittee recommends. Although the Raleigh curve suggests that the flows recommended by both permittee and the Department would enhance juvenile habitat in some months, we find that no enhancement of juvenile habitat

actually would occur at these flows. Further, the low flows supported by the Raleigh juvenile curves would cause severe losses to the adult and spawning life stages.

7.1.3 *Effects of the Two Sets of Minimum Flows on the Fry Life Stage*

The Bovee curve shows that the minimum flows recommended by the Department would preserve all of the preproject fry habitat, and that the minimum flows recommended by the permittee would cause large losses of habitat. However, the Raleigh curve shows that the Department's minimum flow recommendation would provide less habitat than the permittee's minimum flow recommendation. Thus, the two sets of criteria are contradictory with regard to the effect on fry of the different flow rates.

7.1.4 *Effects of the Two Sets of Minimum Flows on the Spawning Life Stage*

Both sets of criteria show reductions in spawning habitat under the minimum flows recommended by both permittee and the Department. However, the reductions in habitat are greater under the permittee's minimum flow recommendations, and the Raleigh curves show no spawning habitat under permittee's minimum flow recommendation. Maintenance of spawning habitat is essential to the

preservation of a fishery. In order to preserve habitat for spawning, the Department's recommendation for minimum flow should be followed during the spawning period.

7.2 *Applicability of the Pinch Period Concept*

The primary basis for the permittee's minimum flow recommendation is that naturally low flows in August, September and October currently limit the population of adult rainbow trout in Rock Creek to those adults which can find habitat during those months. We have no evidence that low summer flows in fact cause adult trout to emigrate from Rock Creek; nor do we have evidence that they do not emigrate. Fishery ecology in streams such as Rock Creek is complex, and limiting factors may change depending on factors other than streamflow.

Assuming that a pinch period occurs, however, the permittee's minimum bypass flow recommendations would provide less habitat for adult trout in May and June than is available during the alleged natural pinch period. As a result, permittee's recommended flows of 11 cfs and 15 cfs would cause an adverse impact on the adult trout population in the months before August in all normal and above-normal water years; i.e., about 50 percent of all years. If a higher bypass flow of 17 cfs were required (permittee has indicated a willingness to

accept a 17 cfs bypass flow), the adult trout population would be adversely affected in above-normal water years. With a higher minimum bypass flow, more adult trout could remain in the system and available for harvest for a longer period each year, whereas the flow recommended by permittee could limit the adult trout population at any time of year. Preservation of the normal harvest period is a primary incident of the maintenance of a fishery. Therefore, the Department's recommendation of 30 cfs and 60 cfs will better protect the preproject fish population if the pinch concept applies.

7.3 *Applicability of the Tennant Method*

The Tennant method is a widely accepted procedure to determine minimum flows that will protect fisheries. It uses percentages of the mean annual flow of the stream to estimate the needed minimum instream flow. It is applicable to streams such as Rock Creek in which only the natural flow is available to supply a minimum downstream flow requirement. If it were used more specifically than it was used herein by the Department, it would have to be calibrated. However, the Department supports use of this method only as a starting point in combination with several other analytic methods.

The results of the fishery habitat modeling analyses confirm the conclusions reached under the Tennant method by showing that the bypass

flows derived under the Tennant method protect habitat for important life stages of trout.

However, the results of applying the Tennant method do not coincide with hydrologic conditions in Rock Creek in July through September. During those months the natural flow rarely exceeds 30 cfs, and even more rarely reaches the 60 cfs recommendation for those months based on the Tennant method. Therefore, the flow bypass requirement should not be more than 30 cfs during those months.

The Tennant method recommends maintenance of 60 percent of the average flow during the primary periods of growth and 30 percent of average flow during other periods. Since the spring months are the months of primary growth, it is appropriate under the Tennant method to require bypass of 60 percent of the average flow during those months. the [sic] Department's recommended minimum bypass flows are based on requiring 30 percent and 60 percent of a mean annual flow of 100 cfs. Based on the hydrologic analysis for Rock Creek, the mean annual flow is between 82.7 cfs and 109.7 cfs. Therefore, bypass recommendations under this method could range from 25 cfs and 50 cfs to 33 cfs and 66 cfs. Thus, after the actual mean annual flow for Rock Creek becomes known, the bypass flows may be varied.

7.4 *Maintaining the Fishery*

Permittee's recommended bypass flows would greatly reduce the fishery habitat in Rock Creek. As a result, major reductions in fish population are likely. With reductions in population and habitat, a reduction in fish harvest is likely. During low flow periods late in summer, fish have few hiding places and become wary and difficult to catch. If the flows recommended by permittee were instituted, fishing success would be severely reduced. On the other hand, the Department's flow recommendations likely will substantially maintain the preproject fishery.

7.5 *Fishery Recruitment to South Fork American River*

The Board found in Decision 1596 that "Rock Creek is important because it provides fishery recruitment to the South Fork American River. . . ." Permittee's recommended minimum bypass flows would substantially reduce the adult and spawning habitat in Rock Creek compared with the Department's recommended flows. Therefore, the Department's recommended flows will better protect fishery recruitment to the South Fork American River.

7.6 *Required Flow*

The various considerations discussed above more strongly support the Department's minimum flow

recommendations, for the purpose of maintaining the fishery resource at natural preproject levels. The Department's recommendation would better protect the adult, juvenile and spawning habitats. It also would maintain a harvestable adult fishery for a longer period into the summer and throughout the year. Further, the Department's recommendation would avoid significant reductions in rainbow trout habitat and population, would protect angler harvest and recruitment to the South Fork American River, and would come much closer than permittee's recommendation to protecting the fishery at natural preproject levels.

8.0 COMPLIANCE WITH THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Board as lead agency prepared and approved a mitigated negative declaration for the Rock Creek Project in accordance with the requirements of the California Environmental Quality Act (CEQA) (Public Resources Code §§ 21000 et seq.) before it adopted Decision 1596. The action herein applies to the same project, and since it will substantially maintain the fishery resources at natural preproject levels, it will not cause a significant adverse impact on the environment. Therefore, no additional CEQA document is required for the action herein.

After the Board adopts this order it will file a Notice of Determination with the Secretary for Resources. Consideration of the Mitigated Negative Declaration and Initial Study, inclusion of

terms and conditions in the permits to carry out the Negative Declaration's mitigation measures, and filing of the Notice of Determination will satisfy the Board's responsibilities under CEQA.

9.0 OTHER MATTERS

Permittee raised two other matters in its brief. First, permittee requested a finding under 23 California Administrative Code § 729.[4] Second, permittee asserted that it should have been allowed to rebut the Department's presentation during the rebuttal phase of correspondence with two fisheries experts at the University of California at Davis and Oregon State University.

9.1 *Section 729 Finding*

Permittee's request for a finding under this section is denied. This section requires the Board upon the request of a party in a proceeding respecting an application to appropriate water, to identify and evaluate the benefits and detriments, including economic and environmental factors, of the various present and prospective beneficial uses of the waters involved and alternative means of satisfying or protecting such uses. The permittee did not make its request for a finding under this section

[4] Effective February 15, 1987, Section 729 of Title 23, California Administrative Code, was revised and renumbered as Section 756.

until it filed its closing statement, long after the evidentiary record was closed. During the hearing, permittee failed to provide adequate evidence upon which such a finding could be based.

Additionally, weighing of beneficial uses such as is suggested by Section 729 was not a subject or issue of the hearing. Such a request would have been proper in the hearing leading to Decision 1596. Since the recent hearing was narrowly drawn to consider only specified issues under a reservation of jurisdiction and not the questions relevant to approving an application, the issue of the relative importance of the project compared with the fishery is not an appropriate consideration herein and, additionally, already has been decided in favor of protection of the fishery resource at the natural preproject level.

9.2 *Permittee's Request to Rebut the Department's Rebuttal*

During the period for introducing rebuttal evidence the Department offered in evidence two letters from fisheries experts regarding the Rock Creek Fishery. Permittee insists that it has a right to rebut the information contained in these letters, and cites several sections from the California Administrative Procedure Act. The Department offered the two letters as rebuttal of some of permittee's evidence, and not as original evidence to support its main case. The letters are accepted in evidence.

Permittee is incorrect in asserting a right to rebut the Department's rebuttal. First, no provision of law requires that a party in a water right hearing be allowed to introduce surrebuttal evidence. Second, the sections of the Administrative Procedure Act cited by permittee do not provide a right to surrebuttal, and do not apply to the Board's proceedings.[5] The Board's proceedings are governed by the Water Code and by the provisions in the Board's regulations at 23 Cal.Adm.Code §§ 648-648.8 and 761-766.

Finally, no provision requires prior notice of exhibits offered in rebuttal. Permittee obviously understood this point, since permittee offered several exhibits during its rebuttal without having previously provided them to the Department and the Board.

The letters in question are hearsay, and can only be used to supplement or explain other evidence. They are not sufficient in themselves to support a finding. 23 Cal.Adm.Code § 648.4. Additionally, it is questionable exactly what the statements in the letters mean, in light of the uncertainty over what the experts were told and what their assumptions

[5] Government Code § 11501 lists the Department of Water Resources as an agency whose proceedings are subject to the Administrative Procedure Act. The Board is a separate agency from the Department, and in fact regulates the water rights of the Department. Apparently, permittee has confused the two agencies in asserting the the [sic] Administrative Procedure Act applies to the Board's water right proceedings.

were. Therefore, we have not relied on the letters in reaching our decision.

10.0 CONCLUSION

Based on the foregoing findings, the Board concludes that Permits 19259 and 19260 issued on Applications 26380 and 27353 should be amended to increase the minimum bypass flow requirement to 30 cfs from July through February and 60 cfs from March through June. Higher high flow requirements may be needed; however, we lack adequate evidence to decide upon a higher requirement. Since the minimum bypass requirements are being raised, permittee may have to install a different measuring device to measure the bypassed flows. Therefore, we will continue to require that permittee install a device that will measure the bypassed flows.

Terms 17a and 17b are no longer needed. Consequently we will delete them. However, we will continue present Term 17c (the reservation of jurisdiction) because further information may show that a different set of minimum bypass flows would be appropriate.

ORDER

IT IS HEREBY ORDERED that Permits 19259 and 19260 shall be amended as follows:

1. Term 16 in both permits is amended to read:

"For the protection of fish, wildlife, and riparian vegetation, permittee shall bypass the following flows:

a. From July 1 through February 29, a minimum of 30 cubic feet per second;

b. From March 1 through June 30, a minimum of 60 cubic feet per second;

c. The total streamflow shall be bypassed whenever it is less than the amount designated for that period.

"No water shall be diverted under this permit unless a device, satisfactory to the State Water Resources Control Board, is installed and is operating which is capable of measuring these bypass flows."

2. Term 17 in both permits is amended to read:

"The State Water Resources Control Board reserves jurisdiction over this permit to amend the bypass flows set forth in Term 16 to protect the fishery resources of Rock Creek at natural preproject levels. Action by the Board will be taken only after notice to interested parties and opportunity for hearing."

3. All other terms and conditions contained in Permits 19259 and 19260 shall remain unchanged and in full force and effect.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a

meeting of the State Water Resources Control Board held on MAR 19 1987.

AYE: W. Don Maughan
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None

/s/ Maureen Marché
Maureen Marché
Administrative Assistant to the Board

9. MOTION REQUESTING JUDICIAL NOTICE

No. 87-7538

In the
UNITED STATES COURT OF APPEALS
for the Ninth Circuit

STATE OF CALIFORNIA *EX REL.*
STATE WATER RESOURCES CONTROL BOARD,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

ROCK CREEK LIMITED PARTNERSHIP,

Intervenor.

On Petition for Review of Orders of Federal Energy Regulatory Commission Regarding Project No. 3189

MOTION REQUESTING JUDICIAL NOTICE

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ROCK CREEK LIMITED PARTNERSHIP

Pursuant to Federal Rule of Evidence 201 and Federal Rule of Appellate Procedure 27, the Rock Creek Limited Partnership ("the Partnership") requests this Court to take judicial notice of the following federal court filings:

In *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946):

1. Petition for a Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia, filed by First Iowa Hydro-Electric Cooperative on Nov. 13, 1945. A copy of this document is attached to this motion as Exhibit A.

2. Memorandum for the Federal Power Commission, filed by the Solicitor General on Dec. 18, 1945. A copy of this document is attached to this motion as Exhibit B.

3. Intervenor's Resistance to Petition for Certiorari to the United States Court of appeals for the District of Columbia, filed by State of Iowa on Dec. 4, 1945. A copy of this document is attached to this motion as Exhibit C.

4. Brief for First Iowa Hydro-Electric Cooperative, filed on Feb. 2, 1946. A copy of this document is attached to this motion as Exhibit D.

5. Brief for the Federal Power Commission, filed on Mar. 7, 1946. A copy of this document is attached to this motion as Exhibit E.

6. Brief for State of Iowa, Intervenor, filed on Feb. 27, 1946. A copy of this document is attached to this motion as Exhibit F.

7. Reply Brief for First Iowa Hydro-Electric Cooperative, filed on Mar. 6, 1946. A copy of this document is attached to this motion as Exhibit G.

8. Reply Brief for State of Iowa, Intervenor, to Brief for Federal Power Commission, filed on Mar. 6, 1946. A copy of this document is attached to this motion as Exhibit H.

9. Petition for Rehearing by State of Iowa, Intervenor, filed on May 22, 1946. A copy of this document is attached to this motion as Exhibit I.

In *Rock Creek Limited Partnership v. State Water Resources Control Board*, No. S-87-0523 (E.D. Cal. filed Apr. 9, 1987):

10. Complaint for Injunctive and Declaratory Relief, filed Apr. 9, 1987. A copy of this document, without exhibits, is attached to this motion as Exhibit J.

11. Stipulation of Facts and Authenticity of Documents, dated Aug. 21, 1987 and filed with the Court shortly thereafter. A copy of this document, not including appendices, is attached to this motion as Exhibit K.

12. Order (Staying Proceedings until Resolution of State Water Board's Appeal to the Ninth Circuit), filed Apr. 22, 1988. A copy of this document is attached to this motion as Exhibit L.

This motion is supported by the accompanying Memorandum of Points and Authorities; the attached Declarations of Gabriele Loebbert and Louis Touton; the Exhibits to this motion; and all pleadings and documents previously filed with this Court.

DATED: June 20, 1988

Respectfully submitted,

JONES, DAY, REAVIS & POGUE

By/s/Louis Touton
Louis Touton
Attorneys for Intervenor
Rock Creek Limited Partnership

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDICIAL NOTICE

Intervenor Rock Creek Limited Partnership requests this Court to take judicial notice of twelve documents contained in the records of the United States Supreme Court and the United States District Court for the Eastern District of California.

Nine of the documents are the parties' filings in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946). These documents demonstrate the arguments made and Questions Presented to the Court in that case. The other three documents consist of the Complaint, Stipulation to Facts and Authenticity of Documents, and Order Staying Proceedings in a parallel action pending between the Intervenor and the Petitioner in this case, *Rock Creek Limited Partnership v. State Water Resources Control Board* (E.D. Cal. No. S-87-0523). These documents indicate the status of that action as well as the stipulations of facts entered into by the parties.

This Court may take judicial notice of these documents pursuant to Federal Rule of Evidence 201, which

provides that judicial notice may be taken of any facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b)(2). Judicial notice may occur at any stage of the proceeding and becomes mandatory where the requesting party has provided the Court with the necessary information. Fed. R. Evid. 201(d), 201(f).

It is well established that courts will take judicial notice of materials in court files. *See, e.g., MGIC Indemnity Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986) (on appeal from dismissal for failure to state a claim, court of appeals took judicial notice of motion to dismiss and supporting memorandum); *United States v. Author Services, Inc.*, 804 F.2d 1520, 1523 (9th Cir. 1986) (court took judicial notice of hearing in a related case). *See also MacMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580, 557-88 (5th Cir. 1985); *Anderson v. Cramlet*, 789 F.2d 840, 845 (10th Cir. 1986).

In the present case, the Partnership is requesting this Court to take judicial notice of the briefs, petitions for certiorari and rehearing and responsive filings in *First Iowa* and the complaint, stipulation of facts, and stay order in *Rock Creek Limited Partnership*. The Partnership submits this request for judicial notice for the purpose of demonstrating the status, arguments made, questions presented, and stipulations in those cases. These documents therefore comply with the requirements of Federal Rule of Evidence 201 and are appropriate for judicial notice by this Court.

Dated: June 20, 1988

JONES, DAY, REAVIS & POGUE

By /s/ Louis Touton
Louis Touton
Attorneys for Intervenor
Rock Creek Limited
Partnership

[The Declaration of Gabriele Loebbert, relating to authenticity of Exhibits A – J, is omitted.]

DECLARATION OF LOUIS TOUTON IN SUPPORT OF INTERVENOR'S MOTION FOR JUDICIAL NOTICE

I, Louis Touton, declare as follows:

1. I am an attorney licensed to practice before the bar of this Court and am associated with the law firm of Jones, Day, Reavis & Pogue, attorneys for intervenor Rock Creek Limited Partnership ("the Partnership") in this matter.

2. I have acted as counsel of record for Rock Creek Limited Partnership in *Rock Creek Limited Partnership v. State Water Resources Control Board* (E.D. Cal. No. S-87-0523) since that action was filed on April 9, 1987. As such, I am familiar with the documents filed in that case and make this declaration on that basis.

3. Attached as Exhibit J to this Motion for Judicial Notice is a true and correct copy of the Complaint (without exhibits) in *Rock Creek Limited Partnership v. State Water Resources Control Board*, (E.D. Cal. No. S-87-0523) (the "Action"), filed on April 9, 1987.

4. Attached as Exhibit K to this Motion for Judicial Notice is a true and correct copy of the Stipulation of Facts and Authenticity of Exhibits (without appendix) entered by the Partnership and the State Water Board in the Action on August 21, 1987, and filed with the Court shortly thereafter.

5. Attached Exhibit L to this Motion for Judicial Notice is a true and correct copy of an order of the Court in the Action received by me shortly after April 25, 1988.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of June, 1988 at Los Angeles, California.

/s/ Louis Touton
Louis Touton

6056d

[Exhibits A – J and L are omitted; Exhibit K follows:]

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Attorneys for Plaintiff
ROCK CREEK LIMITED PARTNERSHIP

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROCK CREEK LIMITED PARTNERSHIP, a California limited partnership, Plaintiff, v. STATE WATER RESOURCES CONTROL BOARD, an agency of the State of California; DARLENE E. RUIZ, EDWIN H. FINSTER, W. DON MAUGHAN, DANNY WALSH, ELISEO M. SAMANIEGO, members of the State Water Resources Control Board; DEPARTMENT OF FISH AND GAME, an agency of the State of California; and JACK C. PARNELL, JAMES D. MESSERSMITH, PETER BONTADELLI, and JERRY L. MENSCH, of the Department of Fish and Game, Defendants.	CASE NO S-87-0523-LKK STIPULATION OF FACTS AND AUTHENTICITY OF DOCUMENTS

Plaintiff Rock Creek Limited Partnership and defendants State Water Resources Control Board, Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh, and Eliseo M. Samaniego, through their respective attorneys of record, stipulate that the following matters may be deemed true for purposes of this action only, but shall be without prejudice to any evidentiary objection based on relevance:

1. Plaintiff Rock Creek Limited Partnership (the "Partnership") is a limited partnership organized and existing under the laws of the State of California.

2. Defendant California State Water Resources Control Board ("State Water Board") is a government agency of the State of California. Pursuant to California law, the State Water Board is responsible for the administration and enforcement of the water right and water quality provisions of the California Water Code.

3. Defendants Darlene E. Ruiz, Edwin H. Finster, W. Don Maughan, Danny Walsh, and Eliseo M. Samaniego are the members of the State Water Board.

4. In an application filed with the Federal Energy Regulatory Commission ("FERC") on June 1, 1982, Joseph M. Keating ("Keating") proposed development of a hydroelectric generating facility on lower Rock Creek, El Dorado County, California (the "Project"). On April 29, 1983, FERC approved the Project in its Order Issuing License, Project No. 3189-003, ("FERC License"), a true and complete copy of which is designated as Exhibit 1 in the appendix to this stipulation.

5. On May 22, 1980 and June 4, 1982, respectively, Keating filed Applications 26380 and 27353 with the State

Water Board for permits to appropriate water to operate the Project. The State Water Board held a hearing on these applications on September 14, 1983. It approved the issuance of permits in a decision dated February 16, 1984. On June 12, 1984, the State Water Board issued to Keating Permits 19259 and 19260 to appropriate water for the Project. These permits established interim bypass flow levels identical to those set forth in the FERC License, subject to reserved jurisdiction for subsequent reconsideration. True and complete copies of the following documents filed with the State Water Board in connection with that hearing and decision are designated as exhibits in the appendix to this stipulation:

Exhibit 2: Application No. 26380.

Exhibit 3: Application No. 27353.

Exhibit 4: Notice of Hearing to be held September 14, 1983, dated August 24, 1983.

Exhibit 5: Transcript of September 14, 1983 hearing.

Exhibit 6: State Water Board Staff Analysis of Record of Applications 26380 and 27353, dated December 12, 1983.

Exhibit 7: State Water Board Decision 1596, issued February 16, 1984.

Exhibit 8: State Water Board Order WR 84-6, Amending and Affirming Decision 1596 and Denying Petitions for Reconsideration, dated May 17, 1984.

Exhibit 9: Permit No. 19259 to appropriate water, issued by the State Water Board on June 12, 1984.

Exhibit 10: Permit No. 19260 to appropriate water, issued by the State Water Board on June 12, 1984.

6. The Partnership purchased the Project from Keating in April 1985, purchasing at the same time all of the rights represented by the FERC License and various other licenses and permits, including those issued by the State Water Board. Transfer of the FERC License to the Partnership was approved in an order issued by FERC on September 10, 1985. A true and complete copy of the FERC order approving the transfer is designated as Exhibit 11 in the appendix to this stipulation.

7. The Partnership accepted the FERC License and, in July 1985, began construction of the Project. The Project was completed in the spring of 1986.

8. The Project diverts water from Rock Creek at a point located in section 20, township 11 north, range 11 east, Mount Diablo base and meridian. The Project's diversion pond lies upstream from the point of diversion and is located in sections 17 and 20, township 11 north, range 11 east, Mount Diablo base and meridian. After the water is passed through a man-made tunnel, penstocks, and turbines, it is returned to Rock Creek near its confluence with the South Fork American River in section 20, township 11 north, range 11 east, Mount Diablo base and meridian. The 7.5' quadrangle "Garden Valley, Calif." map published by the United States Geological Survey, designated as Exhibit 12 in the appendix to this stipulation, accurately portrays the location of the relevant portions of Rock Creek and the South Fork American River. The portion of Rock Creek between the upper end of the diversion pond and the point at which water is returned

to the creek lies within the following portions of sections 17 and 20, township 11 north, range 11 east, Mount Diablo base and meridian:

a. That portion of the SE ¼ of the SW ¼ of section 17 that is bounded on the north, west and east by the Rock Creek Road;

b. The NE ¼ of the NW ¼ of section 20; and

c. The W ½ of the W ½ of section 20.

9. On October 4, 1985, the Partnership filed with FERC a report of a fishery study it had conducted as required by Article 38 of the FERC License. The California Department of Fish and Game ("California Fish and Game") filed comments with FERC on December 6, 1985. FERC took no immediate action on the fishery study or California Fish and Game's comments on that study.

10. At the request of California Fish and Game, the State Water Board held hearings on the bypass flow issue on May 19, 1986 and September 15, 1986. In briefs, memoranda, and argument submitted to the State Water Board, the Partnership objected that the Board had no jurisdiction to regulate bypass flows in a manner different from that set forth in the FERC License and that the Partnership held sufficient riparian and federal reserved water rights to operate the Project without Board approval. True and complete copies of the following documents filed with the State Water Board in connection with the hearings are designated as exhibits in the appendix to this stipulation:

Exhibit 13: Notice of hearing to be held May 19, 1986, dated March 28, 1986.

Exhibit 14: Petitioner's Notice of Intent to Appear, List of Witnesses, and Statements of Witnesses, dated May 1, 1986.

Exhibit 15: Permittee's Prehearing Memorandum Regarding Federal Preemption, Permittee's Riparian Right to Divert Water, dated May 19, 1986.

Exhibit 16: Permittee's Prehearing Memorandum Regarding the Department of Fish and Game's Burden of Proof and the Order of Proof, dated May 19, 1986.

Exhibit 17: Notice of Reopening and continuation of hearing to be held September 15, 1986, dated August 18, 1986.

Exhibit 18: Permittee's Closing Statement, dated October 27, 1986.

Exhibit 19: Closing Argument/Brief of the Department of Fish and Game, dated October 28, 1986.

Exhibits 20 and 21: Transcripts of hearings on May 19, 1986 and September 15, 1986, Volumes 1 and 2.

11. On July 9, 1986, the Partnership filed with FERC a Petition for a Declaratory Order Confirming Interim Minimum Flows or in the Alternative for a Hearing Establishing Permanent Flows. A true and complete copy of that petition is included as Exhibit 22 in the appendix to this stipulation.

12. On February 6, 1987, the State Water Board staff circulated a Staff Analysis of Record and Draft Order regarding the Project. True and complete copies of that Staff Analysis of Record and Draft Order are included as Exhibits 23 and 24 in the appendix to this stipulation.

13. On February 13, 1987, the Partnership filed with FERC an emergency request for expedited action on the July 1986 petition for declaratory order. On March 11, 1987, FERC issued a declaratory order ("FERC Declaratory Order") clarifying and asserting its exclusive authority over the Project, and ordering the Partnership to continue to comply with the bypass flow requirements set forth in the FERC License until further order from FERC. The FERC Declaratory Order stated that hearings would be held by FERC to determine whether bypass flows should remain at 11 cfs and 15 cfs. True and complete copies of the emergency request and the FERC Declaratory Order are included as Exhibits 25 and 26 in the appendix to this stipulation.

14. The State Water Board unanimously voted to adopt the draft Order as final on March 19, 1987. A true and complete copy of Order WR 87-2 Amending Water Right Permits 19259 and 19260 ("State Order"), as adopted by the State Water Board, is included as Exhibit 27 in the appendix to this stipulation. The State Order is currently in effect and subject to enforcement.

15. On April 9, 1987, the State Water Board filed with FERC a Motion to Intervene in the Rock Creek Limited Partnership FERC Proceeding, No. 3189-014. On the same day, the State Water Board filed with FERC a Request for Rehearing of the FERC Declaratory Order, asserting that FERC abused its discretion and acted in an arbitrary and capricious manner and not in accordance with law in deciding that it had exclusive authority to prescribe bypass flows for the Project, and requesting that FERC amend its order to recognize the State Water Board's authority over the Project. On April 28, 1987,

FERC granted the State Water Board's motion to intervene. On May 8, 1987, FERC issued an Order Granting Rehearing for Purposes of Further Consideration. True and complete copies of the State Water Board's motion to intervene, its memorandum of points and authorities in support of the motion to intervene, its Request for Rehearing, FERC's order granting the State Water Board's motion to intervene, and FERC's Order Granting Rehearing are included as Exhibits 28, 29, 30, 31 and 32 in the appendix to this stipulation.

16. On July 14, 15, and 16, 1987, FERC held hearings on the bypass flow issue. California Fish and Game appeared and presented testimony and other evidence at those hearings. As of the date of this stipulation, no ruling on the merits of the issues involved in that hearing has been rendered.

17. The State Water Board is not aware that any person other than the Partnership holds any prior appropriative or riparian water right that is affected by diversion of water from the Creek at the Project's diversion structure and the return of the water to the Creek at the Project's tailrace.

18. The Partnership contends that the State Order violates the Supremacy, Due Process, and Takings Clauses of the United States Constitution, 42 U.S.C. § 1983, and Rock Creek's riparian rights under California law. In issuing the State Order, the State Water Board and its members have taken the position that the State Order violates no applicable provision of the United States Constitution, federal law or state law. Accordingly, there exists an actual controversy between the Partnership and the State Water Board and its members as to the character

and extent of the Partnership's right to use the water for the operation of the Project.

19. True and complete copies of portions of the following Annual Reports of the Federal Power Commission are included in the appendix to this stipulation.

Exhibit 33: Cover page and pages 1-63 of First Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1921.

Exhibit 34: Cover page and pages 224-26 of Second Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1922.

Exhibit 35: Cover page and pages 7-9 of Third Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1923.

Exhibit 36: Cover page and pages 7-12 of Fourth Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1924.

Exhibit 37: Cover page and pages 41-42 of Sixth Annual Report of the Federal Power Commission for Fiscal year Ended June 30, 1926.

Exhibit 38: Cover page, pages 2-7, pages 46-47, and page 134 of Seventh Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1927.

Exhibit 39: Cover page and pages 6-9 of Tenth Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1930.

Exhibit 40: Cover page and pages 11-14 of Eleventh Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1931.

Exhibit 41: Cover page and pages 92-94 of Twenty-sixth Annual Report of the Federal Power Commission for Fiscal Year Ended June 30, 1946.

20. Designated as Exhibit 42 in the appendix to this stipulation are true and complete copies of pages 12-14 and 357-66 of Opinions and Decisions of the Federal Power Commission, Volume 1, January 1, 1931 through June 30, 1939.

DATED: August 21, 1987

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Louis Touton
John M. Genga

By /s/ Louis Touton
Louis Touton

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ROCK CREEK LIMITED PARTNERSHIP

DATED: August 21, 1987

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